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HARVARD LAW LIBRARY

REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF INDIANA,

WITH TABLES OF CASES REPORTED AND CITED, AND STATUTES CITED AND CONSTRUED, AND AN INDEX.

CHARLES F. REMY,
OFFICIAL REPORTER.

JOHN W. DONAKER, Assistant Reporter.

VOL. 160.

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1904.

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JUDGES
OF THE
SUPREME COURT

OF THE
STATE OF INDIANA,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. JOHN V. HADLEY.*‡
HON. LEANDER J. MONKS.†§
HON. JOHN H. GILLET.||
HON. JAMES H. JORDAN.§
HON. ALEXANDER DOWLING.‡

* Chief Justice at November Term, 1902.

† Chief Justice at May Term, 1903.

‡ Term of office commenced January 2, 1899.

§ Term of office commenced January 7, 1901.

|| Term of office commenced January 5, 1903.

OFFICERS
OF THE
SUPREME COURT.

ATTORNEY-GENERAL,
CHARLES W. MILLER.

REPORTER,
CHARLES F. REMY.

CLERK,
ROBERT A. BROWN.

SHERIFF,
GEORGE W. WEIR.

LIBRARIAN,
HOYT N. McCLAIN.

CASES
ARGUED AND DETERMINED
IN THE
Supreme Court of Judicature
OF THE
STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1902, AND MAY TERM,
1903, IN THE EIGHTY-SEVENTH YEAR OF THE STATE.

OSBORN *v.* HOCKER.

[No. 19,719. Filed January 27, 1908.]

MORTGAGE.—*Failure of Mortgagee to Satisfy.*—*Penalty.*—*Attorney's Fees.*

—By reason of an error in the recording of a mortgage, a note secured thereby, for \$1,380, was erroneously described as calling for \$1,308. A purchaser of the real estate, relying upon the record, assumed the payment of the mortgage as a part of the consideration. When the note became due, the purchaser of the real estate paid \$1,308, and upon the refusal of the mortgagee to release the mortgage, brought suit to compel an entry of satisfaction, and to recover penalty and attorney's fees provided for by §1105 Burns 1894. *Held*, that the purchaser was entitled to a release of the mortgage, but could not recover penalty and attorney's fees; since, under the statute, they were recoverable only upon the payment "of the debt or obligation" which "the mortgage was made to secure."

From Hendricks Circuit Court; *R. W. McBride*, Special Judge.

Action by John T. Hocker against Mary A. Osborn. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Reversed*.

Osborn v. Hocker.

R. T. Hollowell, W. N. Harding, A. R. Hovey and C. S. Wilsie, for appellant.

E. G. Hogate and J. L. Clark, for appellee.

MONKS, J.—Appellee sued appellant to compel an entry of satisfaction of a mortgage held by appellant, and to recover the penalty and attorney's fees provided for by §1105 Burns 1894 (Acts 1893, p. 64). A trial of said cause by the court resulted in a special finding of facts and conclusions of law thereon, and final judgment in favor of appellee for the penalty and attorney's fees under said section, and a decree for the satisfaction of said mortgage.

It appears from the special finding that in 1899 Douglass Hall sold and conveyed certain real estate in Hendricks county to appellee, who assumed and agreed to pay, as a part of the purchase money, a mortgage thereon, executed by said Hall and wife to appellant to secure five promissory notes. Said mortgage had been duly recorded within forty-five days after its execution, in the proper mortgage record in the recorder's office of Hendricks county, but one of the promissory notes was stated in said record to be \$1,308, instead of \$1,380, as was stipulated in said mortgage. Appellee purchased said real estate believing in good faith that said promissory note secured by said mortgage was only for \$1,308, as shown by the record thereof, and had no notice or knowledge that it was in fact given for the sum of \$1,380, and that the mortgage so stated. When said notes became due, the amount thereof, counting one of said notes at \$1,308, as shown in the record of said mortgage, instead of \$1,380, as shown in the mortgage, was paid to appellant by appellee, who requested appellant to release and satisfy said mortgage of record, which was refused. At this time, appellee was informed that said mortgage, as to that note, was for the sum of \$1,380, and not for \$1,308, as the same had been recorded. This was the first knowledge that appellee had that the same was for any other or greater sum

Osborn v. Hocker.

than \$1,308. That a reasonable attorney's fee for appellee's attorney is \$25.

Appellant challenges the correctness of the second conclusion of law under which appellee recovered a penalty of \$25, and an attorney's fee of \$25.

It is settled in this State that under the facts found appellant's mortgage was good against appellee for the amount shown by the record, and not for the amount stipulated in the mortgage. *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250; *Johnson v. Hess*, 126 Ind. 298, 315-317, 9 L. R. A. 471; *Lowry v. Smith*, 97 Ind. 466-468; *State, ex rel., v. Davis*, 96 Ind. 539, 544. Section 1105 Burns 1894 (Acts 1893, p. 64) provides, "That any person being the owner or holder of any mortgage recorded in the State of Indiana * * * who shall refuse, neglect or fail to release such mortgage of record when the debt or obligation which such mortgage was made to secure shall have been paid or discharged, and he shall have been requested to release the same, shall forfeit and pay to the mortgagor or other person having the right to demand the release of such mortgage, the sum of \$25, which sum may be recovered by suit in any court of competent jurisdiction, together with reasonable attorney's fees incurred in the collection of said penalty." It has been held by the Appellate Court in *Southern Ind., etc., Assn. v. Doyle*, 26 Ind. App. 102, citing *Reese v. Western Union Tel. Co.*, 123 Ind. 294, 7 L. R. A. 583, *Western Union Tel. Co. v. Axtell*, 69 Ind. 199, *Rogers v. Western Union Tel. Co.*, 78 Ind. 169, 41 Am. Rep. 558, that said section was a penal statute, and must be strictly construed. This decision was approved by this court in *Studebaker Bros. Mfg. Co. v. Morden*, 159 Ind. 173. It will be observed that the penalty and attorney's fee can be recovered under said section only when the debt or obligation which said mortgage was made to secure has been paid.

Taylor v. Patton.

The special finding shows that the mortgage was made to secure an obligation for \$1,380, and that only \$1,308 thereof was paid by appellee. As the special finding does not show that the obligation which said mortgage was made to secure was paid, but, on the contrary, shows it was not paid, it follows that appellee was not entitled to recover the penalty and attorney's fees provided for in said Acts 1893, *supra*. The second conclusion of law was, therefore, erroneous.

The judgment for said penalty and attorney's fees is reversed, with instructions to restate said second conclusion of law, and to render judgment accordingly.

Hadley, C. J., took no part in the decision of this cause.

TAYLOR v. PATTON ET AL.

[No. 19,883. Filed January 28, 1903.]

APPEALS.—Jurisdiction.—Validity of Ordinance.—Where on appeal the validity of an ordinance of a municipal corporation is involved, the jurisdiction, under §9 of act of March 12, 1901 (Acts 1901, p. 565), is in the Supreme Court. p. 6.

MUNICIPAL CORPORATIONS.—Street Improvement.—Validity of Ordinance.

—A statute providing that the common council of a city may order a street to be "graded and paved," gives no authority to such council to enact an ordinance for the grading of a street without paving. pp. 6-8.

SAME.—Assessments for Street Improvements.—Collection.—Estoppel.—An abutting landowner who has full knowledge that persons are in good faith acting upon the assumption that the proceedings in which a special assessment for a street improvement may be made are valid, and stands by without objection till large sums of money are expended upon it, is estopped to deny the authority by which the improvement is made; but, in an action to enforce the collection of the assessment for such improvement, the facts constituting the estoppel must be fully and distinctly pleaded. pp. 8-10.

ESTOPPEL.—Presumption.—Where there is ground for inference or intendment, it will be against the estoppel, and not in its favor. p. 10.

From Montgomery Circuit Court; Jere West, Judge.

180	4
180	379
p180	688
f180	700
180	4
183	285

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Suit by Edward Patton against Annie E. Taylor and others. From a judgment for plaintiff, Annie E. Taylor appeals. *Reversed.*

H. H. Ristine, T. H. Ristine and Harold Taylor, for appellant.

W. H. Johnston, Charles Johnston, M. W. Bruner, Louis McManis, Whittington & Whittington, Benjamin Crane and A. B. Anderson, for appellee.

DOWLING, J.—Action to enforce the collection of an assessment for a street improvement. Complaint in two paragraphs. Demurrer to each paragraph overruled. Answer in one paragraph by Annie E. Taylor, and in two by her co-appellant Harold Taylor. Demurrers to answer of Mrs. Taylor and to second paragraph of answer of Harold Taylor sustained. Trial by court, and judgment for appellees.

Errors are assigned on the rulings on the demurrers, and all present, substantially, the same question.

The complaint contains the usual averments, and thus describes the improvement ordered to be made: "That on June 14, 1900, the common council of the city of Crawfordsville, by a two-thirds vote of all its members, adopted a resolution to grade the roadway and sidewalk, and to construct open gutters along the sides of the roadway, in accordance with profile and specifications on file, * * * the cost of which was to be assessed upon the abutting property." The street so to be graded was one of the public streets of the city of Crawfordsville, and the property of Mrs. Taylor abutted on the portion of said street ordered to be improved.

The objection taken to the complaint is that the resolution of the common council directing the improvement of the street was void, for the reason that it provided for the grading of the street only, and not for grading and paving it, as required by the statute authorizing such improvements.

As there is in question upon this appeal, and duly presented, the validity of an ordinance of a municipal corporation, the jurisdiction of the cause is properly in this court under specification one of §9 of the act of March 12, 1901 (Acts 1901, p. 565, §1337i Burns 1901).

The proceedings of the common council of the city of Crawfordsville in this matter were based upon §§4288, 4292 Burns 1901 (Acts 1889, p. 237, §§1, 5), which read as follows: "4288. That when the owners of two-thirds of the whole line of lots or parts of lots in any city or incorporated town (and measuring only the front line of such lots as belong to such persons resident in such city or town) bordering on any street or alley consisting of one whole square between any two streets crossing the same, or if the common council of such city, or the board of trustees of such town, deem it expedient for any reasonable distance less than one whole square or block upon any square or alley, shall petition the common council of such city or board of trustees of such town to have the sidewalk graded and paved, or the whole width of the street graded and paved, or for either kind of improvement, or for lighting such street according to the general plan of improvements in said city or incorporated town, or for constructing a sewer, the common council of such city or the board of trustees of such town may cause the same to be done by contract, given to the best bidder." "4292. The common council of such city * * * with the concurrence of two-thirds of the members thereof, may order or cause any or all of the improvements mentioned in the first section of this act, * * * to be made in like manner, without such petition."

The question presented is one of statutory construction, and in this State, at least, the case seems to be without precedent. The legislature having enacted a statute upon the subject of the improvement of streets in cities, the power of the common council to cause such improvements to be

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made, and to charge the cost thereof upon the abutting property, must be sought in the statute; and if the improvement is required to be of a particular kind or to a given extent, it follows that the common council, when proceeding under the statute, cannot order an improvement of a different kind or to a greater or less extent than may have been authorized by the statute. It is evident that two distinct kinds of improvement are contemplated by §4288, *supra*,—one consisting of the grading and paving of the sidewalks alone, and the other, of the grading and paving of the whole width of the street. The common council of a city organized under the general law for the incorporation of cities, as was the city of Crawfordsville, might, in its discretion, adopt either of these methods. But we do not think it could authorize an improvement not mentioned in the statute, and charge the abutting property with the expense of making it. The act before us, as we have seen, expressly declares that the common council may cause “the whole width of the street to be graded and paved.” We cannot alter the language of the statute so as to make it read “graded or paved.” *Jessel, M. R., in Morgan v. Thomas*, 51 L. J. Q. B. D. 556, L. R., 9 Q. B. D., 643; *Armstrong v. Moran*, 1 Brad. (N. Y.) 314; *Buck v. Danzenbacker*, 37 N. J. L. 359.

We can discover no good reason why “or” should be substituted for “and” in this act, nor has any been suggested to us. To grade and pave is to make a completed improvement, and is something entirely different from the mere reduction of the natural inequalities of the surface of the ground to a uniform and artificial grade. The statute provides for such complete improvement, and its terms exclude a partial one by grading only. We can easily presume that the legislature had sufficient reasons for using the precise language it employed, thereby requiring the improvement to be made by both grading and paving. The mere graduation of a street might be of little or no benefit to the abutting

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property. If a street should be graded and allowed to stand for a considerable time without further improvement, such grading might be so far impaired or injured by washing away, caving of banks, or the filling up of low levels, as to require the work to be done over. The cost of the full improvement might be seriously increased by separating the grading and paving, and doing the work by piecemeal. Or it might also happen that such partial improvements, with separate assessments for their cost, made in favor of different contractors at different times, would lead to a conflict of rights, and render the collection of assessments doubtful or impossible. The plain letter of the governing statute required that the improvement should be made by grading and paving. The power granted to the city was a special and limited one, and could be exercised only upon the terms on which it was conferred. We feel constrained to follow the language of the statute, instead of construing it, as we are asked by the appellees to do, in such manner as to defeat the plainly expressed legislative intention. §240 Burns 1901; *Massey v. Dunlap*, 146 Ind. 350, 357, 358; *Adams v. City of Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 77 Am. St. 484; *Keith v. Wilson*, 145 Ind. 149; *Burke v. Lukens*, 12 Ind. App. 648, 54 Am. St. 539; *Cleveland, etc., R. Co. v. Edward C. Jones Co.*, 20 Ind. App. 87; *Watson v. Passaic*, 46 N. J. L. 124; *Brown v. Mayor, etc.*, 3 Thomp. & C. 155; *City of Tacoma v. State*, 4 Wash. 64, 29 Pac. 847; *Hawthorn v. City of East Portland*, 13 Ore. 271, 274, 10 Pac. 342; *National, etc., Co. v. City of Kansas*, 20 Mo. App. 237, 242.

The appellees contend, however, that even if the ordinance directing the improvement was invalid, yet, as the contractors relied upon the record of the common council, and laid out money and performed labor for the benefit of the abutting property without objection on the part of the appellant, she is estopped to deny the validity of the proceedings. It is true, undoubtedly, that a landowner who

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has full knowledge that persons are, in good faith, acting upon the assumption that proceedings in which a special assessment for a public improvement may be made are valid, who stands by without objection until considerable sums of money are expended upon it, is estopped to deny the authority by which the improvements are made, or to defeat the assessment against his property for the benefits resulting to it. "And this," it is said, "is true, both where the proceedings for the improvement are attacked for irregularity, and where their validity is denied, but color of law exists for the proceedings." *Board, etc., v. Plotner*, 149 Ind. 116, and cases cited; *Scudder v. Jones*, 134 Ind. 547; *DuPuy v. City of Wabash*, 133 Ind. 336; *City of Bloomington v. Phelps*, 149 Ind. 596; *Cluggish v. Koons*, 15 Ind. App. 599; *Elliott, Roads & Sts.* (2d ed.), §§589, 591. But, as the pleadings stand, while this is the rule, the appellees are not in a situation to take advantage of it. The ordinance which was the foundation of the proceedings for the improvement, and of the assessment against the land of the appellant, was void. This being so, it devolved upon the appellees, if they could, to show by proper averments in their complaint that, notwithstanding the invalidity of the ordinance, facts existed which entitled them to collect the assessment. In the absence of such averments, their complaint failed to state a good cause of action. The fact that the proceedings rested upon an invalid ordinance is apparent upon the face of the complaint. That pleading contains no allegation of the facts assumed by the appellees, that the appellant, with full knowledge that the appellees were acting under the ordinance, and expending money in the improvement of the street upon which her property abutted, stood by, without objection, and acquiesced in the transaction. There is no presumption of law that the appellant had such knowledge, or that she so acquiesced. The matter relied upon by the appellees even if sufficient—which we do not decide—is in the nature of an estoppel,

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and, as such, the facts constituting it must be fully and distinctly pleaded so that the court may determine their sufficiency. Where there is ground for inference or intendment, it will be against the estoppel, and not in its favor. *Frain v. Burgett*, 152 Ind. 55; *Dudley v. Pigg*, 149 Ind. 363; *Center School Tp. v. State, ex rel.*, 150 Ind. 168.

The complaint failed to state facts sufficient to entitle the appellees to any relief, and the demurrers to it should have been sustained. As the complaint was bad, the other errors assigned need not be considered.

Judgment reversed, with instructions to sustain the demurrers to the complaint, and for further proceedings in accordance with this opinion.

THE BOARD OF COMMISSIONERS OF MIAMI COUNTY ET AL. v. MOWBRAY.

[No. 19,986. Filed January 29, 1908.]

COUNTIES.—*County Reform Law.*—*Attorney's Fees.*—*Allowance by Court.*—*Mandamus.*—Under §5594g1 Burns 1901, courts have no power to bind the county for attorney's fees for services rendered in criminal cases beyond the amount of the existing appropriation for that purpose, and an action will not lie against the county to recover for services in such case and to compel the county council by mandate to make an appropriation to pay the same and the county auditor to issue a warrant therefor. *pp. 11-16.*

MANDAMUS.—*Process.*—*Summons.*—*Alternative Writ.*—The mode of acquiring jurisdiction over the defendant in a proceeding for a writ of mandate is not by the service of an ordinary summons, but by service of an alternative writ of mandate as provided by §1184 Burns 1901. *p. 14.*

APPEAL AND ERROR.—*Motion to Quash Summons.*—*Answer.*—*Waiver.*—Defendant in a mandamus proceeding did not waive the right to present for review the action of the court in overruling a motion to quash the summons by afterward filing a demurrer and an answer to the merits of the cause. *p. 15.*

From Miami Circuit Court; *J. T. Cox*, Judge.

Action by William E. Mowbray against the board of commissioners of Miami county and others. From a

160	10
161	191
161	192
161	480

160	10
169	98
170	428
170	541
170	608

160	10
1171	642

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judgment for plaintiff, defendants appeal. Transferred from Appellate Court, under §1837u Burns 1901. *Reversed.*

John Mitchell, H. P. Loveland and R. J. Loveland, for appellants.

E. T. Reasoner and John W. O'Hara, for appellee.

MONKS, J.—Appellee brought this action against appellants, the board of county commissioners of Miami county, Clarkson Macy the auditor of said county, and the county council, to recover a judgment against said county for services rendered by appellee as an attorney in defense of a person charged with the crime of rape, in the circuit court of said county, under an appointment by said court, and to compel said county council, by writ of mandate, to make an appropriation to pay the same, and to compel the said auditor to issue a warrant therefor on the county treasurer. A trial of said cause resulted in a judgment against appellants as prayed for in the complaint.

It was alleged in the complaint "that appellee was appointed by the Miami Circuit Court, at its April term, 1900, to render services as an attorney in the defense of Frank L. Rennols, charged in said court with the crime of rape; that he accepted said appointment, and rendered services as attorney in said cause of the value of \$250, a bill of particulars of which is filed herewith, and marked exhibit A; that on the 2d day of July, 1900, said court made an allowance of \$250 for said services; that on July 2, 1900, appellee presented a certified copy of said allowance to the auditor of said county, who issued a warrant for \$45, which sum was paid to appellee; that appellee demanded of said auditor a warrant on the treasurer of said county for the residue of the amount of said allowance remaining unpaid, but said auditor refused, and still refuses, to issue a warrant therefor, for the reason that there is no money in the treasury of the county appropriated by the county council to pay the same; that in making estimates of court expenses for the year ending December 31, 1900, the clerk

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of the Miami Circuit Court estimated an amount necessary to pay attorney's fees in criminal and civil cases at \$1,000, but the appropriation therefor by the county council of said county was only \$500; that at the meeting of said county council in August, 1900, the attention of said council was called to said matter, and they were asked by said appellee to make an appropriation of \$205 for the payment of said deficiency, but said council neglected and refused, and still refuses, to make an appropriation therefor; that afterwards, on September 7, 1900, appellee caused said claim, duly verified by his affidavit, to be filed by the auditor of said county in the office of said auditor for allowance by said board of commissioners, but said board failed, neglected, and refused to allow said claim, or any part thereof, and still fails, neglects, and refuses to make any order for the payment of the same, for the reason that no appropriation therefor has been made by said county council; that said sum of \$205 is now due and unpaid, together with interest."

A county is a subdivision of the State, created by the sovereign power for governmental purposes. Such subdivisions are instrumentalities of government and exercise the powers delegated by the State. 7 Am. & Eng. Ency. Law (2d ed.), 900 *et seq.*; *White v. Board, etc.*, 129 Ind. 396; *Board, etc., v. Daily*, 132 Ind. 73; *Board, etc., v. Rickel*, 106 Ind. 501, 503; *Dillon, Mun. Corp.* (3d ed.), §§23, 53; 1 Beach, Pub. Corp., §8. If such powers are delegated by the legislature, and not by the Constitution, the legislature may enlarge, diminish, or withdraw the same entirely, in the absence of a constitutional restriction.

The act approved March 3, 1899 (Acts 1899, pp. 343-365, §§5594g-5594e2 Burns 1901), commonly known as the county reform law, made many radical changes in the manner of doing county business, and as to the powers of boards of commissioners, officers, and courts to create a liability against the county. It is provided by §27 of said

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act (§5594g1 Burns 1901) that: "No court, or division thereof, of any county, shall have power to bind such county by any contract, agreement, or in any other way, except by judgment rendered in a cause where such court has jurisdiction of the parties and subject-matter of the action, to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose of such court, and for the purpose for which such obligation is attempted to be incurred, and all contracts and agreements, express or implied, and all obligations of any and every sort attempted beyond such existing appropriations shall be absolutely void." Before the enactment of said county reform law, it was held that the circuit court had authority to assign counsel to defend poor and destitute persons charged with crime in such court, and bind the county therefor. The allowance by such court for such services, however, was not conclusive against said county, but only *prima facie* evidence that the services were so rendered. *Board, etc., v. Pollard*, 153 Ind. 371-373, and cases cited. It was held, however, in said case, that such court had no power to make an allowance to an attorney appointed by the court as counsel for a poor person in a civil action, for the reason that the legislature had not left the protection of the rights of the poor suitor in a civil action to the exercise of the inherent powers of the court, as in criminal causes, but had, by §261 Burns 1901, §260 R. S. 1881 and Horner 1901, expressly regulated the procedure in such cases. By said §27, *supra*, the legislature has limited the power of courts, so that in criminal cases they have no power to bind the county for attorney's fees for services rendered in criminal cases, beyond the amount of the existing appropriation for that purpose. *Turner v. Board, etc.*, 158 Ind. 166.

It appears from the complaint that all of the amount appropriated by the county council for the purpose of paying for services of attorneys in defending poor persons charged with crime had been expended, except \$45, at the

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time appellee rendered the services mentioned. Appellee was bound to take notice of the law on this subject,—that the court had no power to bind the county beyond that amount. Having voluntarily performed the services sued for, with such knowledge, appellee has no ground to claim compensation in excess of the amount of \$45, which the complaint shows he has received from the county. *Board, etc., v. Pollard*, 153 Ind. 371, 375. It is evident that the court erred in overruling the demurrer of the board of commissioners to the complaint for want of facts.

It appears from the record that the process issued and served upon the Miami county council, one of the appellants, was a summons in the ordinary form, and not an alternative writ of mandate. The Miami county council, by its attorneys, entered a special appearance to said proceeding in the court below, and filed a motion to quash said summons, for the reason that it was an ordinary summons, and not an alternative writ. This motion the court overruled, to which said appellant reserved an exception. This ruling of the court is assigned as error in this court.

The mode of acquiring jurisdiction over the defendant in a proceeding for a writ of mandate is not by the service of an ordinary summons, but by service of an alternative writ of mandate. §1184 Burns 1901, §1170 R. S. 1881 and Horner 1901; *Wren v. City of Indianapolis*, 96 Ind. 206, 211; *Potts v. State, ex rel.*, 75 Ind. 336, and cases cited; *Jessup v. Carey*, 61 Ind. 584, 590. See, also, *Johnson v. Smith*, 64 Ind. 275, 280; 13 Ency. Pl. & Pr., 760-762; *Works' Prac.* (3d ed.), §§217, 1447, 1448. In *Jessup v. Carey, supra*, at page 590, it was said: "It does not appear from the record that an alternative writ of mandate was applied for or issued in this action; but the appellants appeared, probably in obedience to an ordinary summons, and demurred to and answered the appellee's verified complaint, as containing his cause of action. The proceeding is certainly informal and defective in its inception. The suit

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should have been commenced in the name of the State of Indiana, upon the relation of the appellee; and, upon his affidavit filed, the appellee should have moved the court for an alternative writ of mandate, requiring the appellant Jessup, as sheriff, to execute and deliver to him a deed of the real estate described in his certificate, or show sufficient cause, in his return to said writ, why he failed or refused so to do. This alternative writ of mandate would then have constituted the plaintiff's complaint, or cause of action; and upon it issues of law or fact might have been joined, as in other cases. *Board, etc., v. State, ex rel.*, 61 Ind. 75; and *Board, etc., v. State, ex rel.*, 61 Ind. 379."

The issuance and service of the alternative writ may be waived by a full appearance to the action. *Wren v. City of Indianapolis*, 96 Ind. 206, 211; *Pfister v. State, ex rel.*, 82 Ind. 382. In this case, said appellant, after the court overruled its motion to quash said summons, filed a demurrer to the complaint, which was overruled, after which it filed an answer to the merits of the cause, and thus entered a full appearance to the action; but said appellant did not thereby waive its right to present for review said ruling of the court on the motion to quash said summons. *American, etc., Ins. Co. v. Mason*, 159 Ind. 15, and cases cited; 2 Ency. Pl. & Pr., 629, 630; 3 Cyc. Law & Proc., 525, 526; Elliott, App. Proc., §§677, 678; *Perkins v. Hayward*, 132 Ind. 95, 100, 101; *Chandler v. Citizens Nat. Bank*, 149 Ind. 601, 603. It follows that the court below erred in overruling the motion to quash said summons. The action of the court in overruling the motion of appellant Macy, county auditor, to quash said summons as to him was erroneous for the same reason.

As the facts alleged in the complaint did not show that appellee, in a court having jurisdiction of the parties and the subject-matter of the action, had recovered a judgment against the county, in its corporate capacity, for his said services as attorney in said cause, the same was not

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sufficient to withstand the demurrer for want of facts of the Miami county council, and the court therefore erred in overruling said demurrer. *State v. Kerr*, 158 Ind. 155.

The action against the county auditor proceeds upon the theory that it is his duty to issue a warrant in favor of appellee for the amount of his claim, when the same is appropriated by the county council. As the complaint is not sufficient against the county council, it follows that it was not sufficient against said auditor. The court therefore erred in overruling the demurrer of the appellant Macy, auditor of said county, to the complaint.

Judgment reversed, with instructions to sustain the demurrer of the board of commissioners to the complaint, and to sustain the motions of the county council and Macy, auditor, to quash the summons.

Gillett, J., concurs in the result.

THE PENNSYLVANIA COMPANY v. LEEMAN.

[No. 20,004. Filed January 29, 1903.]

REMOVAL OF CAUSES.—Application.—The filing and presenting of a proper application and bond for the removal of a cause to the federal court, by one entitled to the removal, *ipso facto* deprived the trial court of the right to proceed further. *p. 18.*

SAME.—Waiver.—Alleged error of court in denying the application of defendant for the removal of the cause to the federal court is not waived by the defendant by defending itself in the court below after its petition has been denied. *p. 19.*

SAME.—Time of Making Application.—A cause will not be reversed because of the ruling of the court in denying a petition for the removal of the cause to the federal court, where it appears from the record that the petitioner took a change of venue and afterward filed a dilatory plea on which a trial was had and made the application for removal more than five months after coming into court; since it will be presumed in view of the provisions of the code relative to the making of issues, nothing appearing in the record to the contrary, that the time when defendant was required to answer the complaint had expired when it tendered its application for removal. *pp. 17-23.*

SAME.—Amended Complaint.—The action of the court in denying the application of defendant for the removal of a cause to the fed-

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eral court because of delay in making the application will not be reversed because of the filing of an amended complaint, where the original complaint is not in the record and it can not be ascertained whether the cause was changed from a non-removable to a removable one. . pp. 22, 23.

From Boone Circuit Court; *B. S. Higgins*, Judge.

Action by Enoch Leeman against the Pennsylvania Company. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under §1387u Burns 1901. *Affirmed*.

S. O. Pickens, for appellant.

W. J. Beckett and *A. J. Shelby*, for appellee.

GILLET, J.—The appellee on the 13th day of August, 1900, filed his complaint in the Hendricks Circuit Court against appellant. On the 4th day of September, 1900, the latter filed a plea setting up a state of facts on which it based a challenge to the jurisdiction of the Hendricks Circuit Court to hear and determine the cause, and concluding with a prayer that the action abate. On the 18th day of September, 1900, appellant procured, and afterwards perfected, a change of the venue of said cause to the court below. Appellee filed a general denial to the plea in abatement, and on the 6th day of February, 1901, after a trial, said court entered a finding and judgment for appellee upon said plea. Appellee then filed an amended complaint in three paragraphs, and the court entered a rule against appellant to answer said complaint. Thereupon appellant filed its petition to remove said cause to the United States Circuit Court for the district of Indiana, on the ground commonly denominated as diverse citizenship, and at the same time filed its bond in that behalf, as required by law. The court approved the bond, but overruled the petition, and the appellant excepted to the latter ruling. Issues of fact were afterwards formed on the amended complaint, and a trial resulted in a verdict and judgment for appellee.

The leading question in the case is, did the court below

err in overruling the petition for removal? Upon a compliance with the act of congress relative to the removal of causes (25 Stat. at Large, 433), the act provides that: "It shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit." If the appellant was entitled to the removal, the filing and presenting of a proper application and bond *ipso facto* deprived the trial court of the right to proceed further. *Kern v. Huidekoper*, 103 U. S. 485, 26 L. Ed. 354; *Railroad Co. v. Koontz*, 104 U. S. 5, 26 L. Ed., 643; *Postal Tel. Cable Co. v. Southern R. Co.*, 88 Fed. 803; *Mecke v. Valley Town Mineral Co.*, 89 Fed. 209. We are not called upon here to consider whether the writ of *certiorari* provided for by §7, 18 Stat. at Large, 472, operates as a supersedeas. 4 Ency. Pl. & Pr., 205; *Removal Cases*, 100 U. S. 457, 474; *Stone v. South Carolina*, 117 U. S. 430, 6 Sup Ct. 799, 29 L. Ed. 962. Even if the writ does not have that effect, the United States Circuit Court has power to bring about the same result by enjoining the plaintiff from prosecuting the action in the state court. *French v. Hay*, 22 Wall. 250, 22 L. Ed. 857; *Dietzsch v. Huidekoper*, 103 U. S. 494, 26 L. Ed. 497; *Baltimore, etc., R. Co. v. Ford*, 35 Fed. 170; *Abeel v. Culberson*, 56 Fed. 329. Where no such action is taken, however, and the defendant simply procures a transcript of the proceedings and files it in the United States Circuit Court, the result is, if both courts thereafter assert jurisdiction, that a case is presented where each court proceeds on its own responsibility in the matter of jurisdiction, both being ultimately subject to the control of the Supreme Court of the United States. As stated in *Missouri Pac. R. Co. v. Fitzgerald*, 160 U. S. 556, 582, 16 Sup. Ct. 389, 396, 40 L. Ed. 536: "If a state court proceeds to judgment in a cause notwithstanding an application for removal, its ruling in retaining the case will be reviewable here after final judgment under §709 of the revised statutes. *Stone v. South Carolina*, 117 U. S. 430. If a case be removed to the cir-

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cuit court and a motion to remand be made and denied, then after final judgment the action of the circuit court in refusing to remand may be reviewed here on error or appeal. *Graves v. Corbin*, 132 U. S. 571. If the circuit court and the state court go to judgment, respectively, each judgment is open to revision in the appropriate mode. *Removal Cases*, 100 U. S. 457."

We are unadvised as to whether the United States Circuit Court has asserted jurisdiction over this cause, and it appearing from the record that the court below refused to order the removal, and asserted its continued jurisdiction over the cause, we are called upon to determine whether the record shows error.

Counsel for appellee err in their contention that the error, if any, was waived by the appellant by defending itself in the court below after its petition had been denied. *Removal Cases*, *supra*; *Insurance Co. v. Dunn*, 19 Wall. 214, 22 L. Ed. 68; *Kern v. Huidekoper*, *supra*.

To entitle a defendant to a removal, on the ground mentioned, he must file his petition at or before the time when he is "required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff," and make and file therewith a bond with good and sufficient surety conditioned as required by the statute. §3, 25 Stat. at Large, 433, 435.

It has been held that the interposing of a demurrer, motion, or answer, before the time for the filing of answer is required, does not shorten the time for filing an application to remove. *Gavin v. Vance*, 33 Fed. 84; *Duncan v. Associated Press*, 81 Fed. 417. While doubt has been cast on the proposition stated, by *Fidelity, etc., Co. v. Newport News, etc., Co.*, 70 Fed. 403, we will assume that the filing of the answer mentioned did not, *per se*, shorten the time to file answer. We therefore turn to the Indiana statutes relative to the making up of issues. Section 403 Burns 1901 pro-

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vides that: "On the second and each succeeding day of the term, the court shall call as many of the causes which stand for trial at such term, for issues, as the business of the court will permit; * * * and shall compel the parties to file their respective pleadings and answers to interrogatories, at such time as the court shall deem just, in no case allowing unreasonable delay, and the pleadings shall be completed at an early day of the term." Section 367 of the code provides that: "Every action shall stand for issue and trial at the first term after it is commenced, when the summons have [has] been served on the defendants ten days, or publication has been made for thirty days before the first day of the term," and the proviso of that section authorizes the making of the cause returnable specially, upon a day in term, by indorsement upon the complaint, and that in that event, upon the completion of service, the action shall stand for issue and trial at such term. Section 1375 Burns 1901 authorizes the circuit court to adopt rules, etc.

As was said in *Amsden v. Norwich Union Fire Ins. Soc.*, 44 Fed. 515, there is nothing explicit in the Indiana civil code in respect to the matter of answering or pleading, but the matter is left to be governed by the rules or practice of the court. The validity of a general rule was impliedly recognized in that case; and in *Daugherty v. Western Union Tel. Co.*, 61 Fed. 138, the court refused to take jurisdiction of the cause because the application was made after the time allowed the defendant to answer under a general rule of the state court had expired. The record in this case does not show that the appellant was expressly ruled to answer until after the filing of the amended complaint. The rule at that time entered does not exclude the idea of the existence of a general rule that was perhaps inapplicable to the particular case. With a record silent as to whether there was a general rule of court respecting the filing of answers, and the burden upon the appellant to show error, and considering that the code contemplates that the issues

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shall be made up promptly, we think we may presume that the time when appellant was required to answer the complaint had expired when it tendered its application for removal.

Admitting that the plea that was filed afforded such an obstacle to the operation of a general rule to answer that an answer to the merits could not be required until the pending plea was disposed of, the question arises whether such plea was not an answer within the statute. This question has been determined. In *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 673, 686, 14 Sup. Ct. 533, 38 L. Ed. 311, it was said: "This provision allows the petition for removal to be filed at or before the time when the defendant is required by the local law or rule of court 'to answer or plead to the declaration or complaint.' These words make no distinction between different kinds of answers or pleas; and all pleas or answers of the defendant, whether in matter of law by demurrer, or in matter of fact, either by dilatory plea to the jurisdiction of the court or in suspension or abatement of the particular suit, or by plea in bar of the whole right of action, are said, in the standard books on pleading, to 'oppose or answer' the declaration or complaint which the defendant is summoned to meet. Stephen, Pleading (1st Am. ed.), 60, 62, 63, 70, 71, 239; Lawes, Pleading, 36. The judiciary act of September 24, 1789, c. 20, §12, required a petition for removal of a case from a state court into the circuit court of the United States to be filed by the defendant 'at the time of entering his appearance in such state court.' 1 Stat. 79. The recent acts of congress have tended more and more to contract the jurisdiction of the courts of the United States, which had been enlarged by intermediate acts, and to restrict it more nearly within the limits of the earliest statute. *Pullman Car Co. v. Speck*, 113 U. S. 84; *Smith v. Lyon*, 133 U. S. 315, 320; *In re Pennsylvania Co.*, 137 U. S. 451, 454; *Fisk v. Henarie*, 142 U. S. 459, 467; *Shaw v. Quincy Mining Co.*, 145 U. S.

444, 449. Construing the provision now in question, having regard to the natural meaning of its language, and to the history of the legislation upon this subject, the only reasonable inference is that congress contemplated that the petition for removal should be filed in the state court as soon as the defendant was required to make any defense whatever in that court, so that, if the case should be removed, the validity of any and all of his defenses should be tried and determined in the circuit court of the United States."

Laying aside for the moment all question as to the effect of the filing of an amended complaint, we have to say that it cannot be that a defendant who appears to have taken a change of venue, and filed a dilatory plea, on which a trial has been had, can insist, after more than five months has passed since his coming into court, that his time to answer shall not be presumed to have expired. The appellant occupies the seeming attitude of experimenting with the state court, within the case of *Rosenthal v. Coates*, 148 U. S. 142, 13 Sup. Ct. 576, 37 L. Ed. 399, instead of asserting its right of removal promptly, as the spirit of the act of congress requires.

Did the filing of an amended complaint extend the time of removal? It has been said by the Supreme Court of the United States that the requirement as to the time within which a removal must be applied for is not jurisdictional, but modal and formal, and to avoid a denial of the right of removal, where circumstances have intervened that were wholly beyond the control of the defendant, it will be held in such cases that the incidental provision as to time must yield to the principal provision as to the right. *Powers v. Chesapeake, etc., R. Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673. If the appellee had by amendment changed the cause from a non-removable to a removable one, or had made an amendment to a removable cause that operated to introduce a new cause of action, also removable, we do not

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doubt that such amendment would authorize the appellant to remove the cause. In this case, however, the original complaint that was taken out of the record by the filing of an amended complaint has not been brought into the record by bill of exceptions or otherwise; in fact, it is not in the transcript, and we do not know wherein it differed from the amended complaint. If the amendment was only of a formal character, the provision of the statute as to the time of the filing of the application to remove ought to prevail. The trial court had a right to inspect the whole record, when it passed on the motion to remove, to ascertain whether the petition was filed in time (*Powers v. Chesapeake, etc., R. Co., supra*), and it is our opinion that we ought to presume, in favor of its action, that the motion was filed too late. As said by Campbell, J., speaking for the supreme court of Michigan in a case where the lower court had denied a petition to remove: "We are bound to assume that the court below put its action upon a legal ground and not an erroneous one, and it is for the party alleging error to show error." *Schwab v. Coots*, 48 Mich. 116, 11 N. W. 832. Error will not be presumed where the record is silent or incomplete. 2 Ency. Pl. & Pr., 420 *et seq.*; 18 Ency. Pl. & Pr., 345, 397, 398; Elliott, App. Proc., §717. We can not reverse this case on the ground that the court below denied the petition to remove.

A motion was made by appellant, relative to the amount of the judgment, that was overruled. The action of the court was proper. *Chicago, etc., R. Co. v. Ostrander*, 116 Ind. 259; *Salem-Bedford Stone Co. v. Hilt*, 26 Ind. App. 543.

Judgment affirmed.

LAAKMANN ET AL. v. PRITCHARD.

[No. 19,994. Filed February 8, 1903.]

MUNICIPAL CORPORATIONS.—*Street Improvements.—Assessments.*—A lien for street improvements made pursuant to the act of 1889 (Acts 1889, p. 237) can not be enforced, where the common council of a city has failed to make the assessment as provided for by §7 of said act.

From Johnson Circuit Court; *W. J. Buckingham*, Judge.

Suit by Fred Laakmann and others against William T. Pritchard. From a judgment for defendant, plaintiffs appeal. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

E. P. Ferris and *W. W. Spencer*, for appellants.

R. M. Miller and *H. C. Barnett*, for appellee.

GILLET, J.—Appellants filed a complaint in two paragraphs, asserting and seeking to foreclose a lien for the construction of a cement sidewalk opposite the real estate of appellee. The proceedings were had under the act of March 8, 1889 (Acts 1889, p. 237). A demurrer was sustained to each paragraph of said complaint, final judgment was rendered that appellants take nothing, and on appeal the question is presented as to whether either paragraph of their complaint is sufficient.

We do not find in either paragraph the averment that the city council of the city of Franklin, under whose authority the improvement was made, has made the assessment provided for by section seven of said act. The common council is constituted a special agent to determine, after the hearing provided for by said section, whether the improvement has been made and completed according to the terms of the contract, and, if so, to levy assessments against abutting property. *Robinson v. City of Valparaiso*, 136 Ind. 616; *Adams v. City of Shelbyville*, 154

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Ind. 467; *Darnell v. Keller*, 18 Ind. App. 103. While we recognize the principle of estoppel in cases that properly call for its application, yet that affords no reason why the contractor should voluntarily abandon the pursuit of the provisions of the statute relative to the fixing of his lien.

There is no error in the record. Judgment affirmed.

INDIANA RAILWAY COMPANY v. MAURER.

[No. 20,005. Filed February 3, 1903.]

TRIAL.—Verdict.—Interrogatories to Jury.—Conflict.—A general verdict will not be defeated by isolated facts disclosed by answers to interrogatories, unless such facts are shown to be so repugnant and contradictory to the general verdict that both can not be true under any conceivable state of facts provable under the issues. pp. 26, 27.

SAME.—Interrogatories.—Motion for Judgment.—General Verdict.—Contributory Negligence.—Presumption.—In an action against a street car company for injuries sustained by plaintiff while attempting to alight from a car, the evidence showed that plaintiff held to the running-board of the car and was dragged thereby and injured. There was a general verdict for plaintiff, and in answer to an interrogatory as to whether plaintiff could have released his hold on the car and have avoided being injured, the jury answered "No evidence." *Held*, that the trial court, on motion by defendant for judgment notwithstanding the general verdict, could not presume that plaintiff could have released his hold by the exercise of ordinary care and was therefore guilty of contributory negligence. pp. 27, 28.

NEGLIGENCE.—Alighting from Street Car.—Where an aged and crippled passenger was thrown down by the premature starting of a street car from which he was attempting to alight, and in the fall caught hold of the car and was dragged and thereby injured, his act in holding to the car did not, under the circumstances, constitute contributory negligence. p. 28.

CONTINUANCE.—Absent Witness.—Admissions.—Defendant asked a continuance to enable him to procure the testimony of an absent witness. To avoid a postponement of the trial, plaintiff admitted that if present the witness would testify to the material facts set forth in defendant's affidavit in support of his motion. *Held*, that plaintiff's admissions did not embrace statements of conclusions set forth in the affidavit. p. 29.

WITNESSES.—Leading Questions.—Discretion of Court.—While as a general rule leading and suggestive questions should be disallowed,

160	25
165	27
165	29

160	25
166	70
168	447

160	25
171	407

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yet, to permit leading questions will not constitute reversible error unless it very clearly appears that there was such abuse of discretion as amounts to substantial injustice. *p. 30.*

DAMAGES.—*Evidence.*—*Complaint of Pain.*—In an action for personal injuries, evidence that plaintiff complained of pain to one not a physician, and at a time other than the time of the injury, is admissible. *p. 30.*

TRIAL.—*Instructions.*—The propriety of an instruction is to be determined not by whether it embodies a correct statement of the law upon a given state of facts, but whether it correctly states the law relevant to the issuable facts given in evidence on the trial. *p. 31.*

SAME.—*Instruction not Relevant to Issues.*—*Injury of Street Car Passenger While Alighting from Car.*—Where, in an action against a street car company for personal injuries sustained by plaintiff while attempting to alight from a car, the only act of negligence complained of was the premature starting of the car, an instruction, that the defendant should be found guilty of negligence if its employes in charge of the car failed to assist plaintiff to alight, was erroneous. *pp. 30, 32.*

From St. Joseph Circuit Court; *W. A. Funk*, Judge.

Action by John Maurer against the Indiana Railway Company. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Reversed.*

A. L. Brick and *D. D. Bates*, for appellant.

O. M. Cunningham and *F. J. L. Meyer*, for appellee.

HADLEY, C. J.—Suit by appellee to recover damages for injuries received through the alleged negligence of appellant in operating its street railroad in the city of South Bend. Upon issues joined by the general denial, the jury returned its verdict for appellee for \$400, and therewith returned their answers to divers interrogatories propounded by the court. Appellant's motion for judgment upon said answers, notwithstanding the general verdict, was overruled, as was also its motion for a new trial. The errors assigned and not waived assail the action of the court in overruling these several motions.

1. A general verdict is the solemn declaration of the jury that upon all the facts proved in the case the plaintiff's

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injury was the direct and proximate result of the defendant's negligence charged in the complaint, and that the plaintiff was free from fault contributing thereto; and in support of the conclusion of the jury it has been often decided by this court that a general verdict will not be defeated by isolated facts disclosed by answers to interrogatories, unless such facts are shown to be so repugnant and contradictory to the general verdict that both can not be true under any conceivable state of facts provable under the issues. *Southern Ind. R. Co. v. Peyton*, 157 Ind. 690, and cases cited. In determining the force of such specific facts we can look only to the pleadings, the general verdict, and answers to interrogatories. *Consolidated Stone Co. v. Summit*, 152 Ind. 297.

It is averred in the complaint that the plaintiff is old, infirm, and possessed of but one leg; that in alighting from the street car it was necessary for him to use both hands in supporting himself; and that while reaching for and attempting to remove from the car a grip bag which he had, and before he had time to remove it, the defendant suddenly and negligently started the car, thereby causing the plaintiff to be thrown down and dragged by the car, whereby he was injured, etc. The answers to interrogatories show that appellee was a passenger upon appellant's street car, and carried a satchel. The car was stopped to permit appellee to alight. The conductor did not assist him, and while appellee was reaching for his grip bag the car was suddenly started, and threw appellee down. Appellee in falling, caught hold of the running-board of the car, and holding on thereto was dragged a distance of ten feet, and injured by being so dragged. The twenty-fourth interrogatory and answer were as follows: "Could the plaintiff have released his hold on the car, and have avoided being dragged? A. No evidence."

It is argued that appellee's holding on to the running-board of a moving car, after he had fallen, until it had

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dragged him ten feet, is *prima facie* contributory negligence, and therefore incumbent upon appellee to show affirmatively that he could not let go the car, and avoid being dragged; and, as there was no evidence upon the point, the court must presume that he could have released his hold by the exercise of ordinary caution, and have avoided the injury. Appellant's argument must fail for two reasons: (1) Because this court can indulge no presumption against the general verdict; and (2) because of the well established rule that "One who does an act under an impulse or upon a belief created by a sudden danger attributable to another's negligence is not to be regarded as guilty of contributory fault, even though the act would be regarded as a negligent one if performed under circumstances not indicating sudden peril." *Clarke v. Pennsylvania Co.*, 132 Ind. 199, 17 L. R. A. 811; *Pennsylvania Co. v. McCaffrey*, 139 Ind. 430, 29 L. R. A. 104; *Lake Erie, etc., R. Co. v. McHenry*, 10 Ind. App. 525. Here the plaintiff was old, infirm, and with but one leg, and as he stood by the side of the car, necessarily leaning upon his crutch, or holding to the car, while he reached for his grip bag, by the untimely and negligent starting of the car, he was thrown to the ground, and near to the revolving wheels of the car. Having been thus suddenly and unexpectedly cast into a situation that might reasonably appear to him to be one of imminent danger of losing his life or of suffering great bodily harm, the seizing of the running-board, which would at least stay him from passing under the wheels, can not be accounted contributory negligence, *per se*, even though it was clear to one not imperiled that the safer course would have been not to have seized the running-board. The jury, whose duty it was to characterize the act, determined by their general verdict that appellee was free from contributory fault; and that must be the end of it so far as it is affected by the interrogatory and answer in question.

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2. Before the trial appellant seasonably moved the court for a continuance of the cause to enable it to procure the testimony of an absent witness, who was the motorman of the car by which appellee was injured. To avoid a postponement of the trial, appellee indorsed upon the affidavit filed in support of the motion for a continuance an admission that the absent witness, if present, would testify to the material facts stated in the affidavit. Subsequently appellee moved the court that certain sets of words contained in the affidavit for continuance be not read to the jury as admitted testimony of the absent witness, for the reason that such words stated incompetent conclusions only. The several sets of objectionable words follow: (a) "Through no fault of the defendant, or its officers, or agents, or employes, but through his own negligence and fault." (b) "And that if plaintiff had not fallen by his own negligent act, no accident could have happened to him by reason of the starting of the car." (c) "That at the time the car was started by the motorman there was no possible danger of any injury to the plaintiff." (d) "And did not suffer any injury by reason of the accident as aforesaid." Which motion the court sustained and denied appellant the right to read said words to the jury. Of this action appellant complains. The full scope of appellee's admission was, in effect, that if the absent witness was present he would testify to all the competent and material facts set forth in the affidavit. The admission did not embrace the conclusions which the witness might draw from the facts testified to, and which he would not be permitted to state if testifying before the court. Conclusions are for the jury and not for witnesses to draw. We deem it unprofitable to set forth the context in which the several sets of words appeared, as it is sufficiently clear from the words themselves that they would have been purely conclusions of the witness. The court therefore did not err in withholding them from the jury.

3. Appellee testified through an interpreter. In describing how the injury was produced his attorney directed the interpreter, "Tell him to state whether or not his foot at that time became twisted or wrenched?" Appellant's objection to the question, because it was leading and suggestive, was overruled. The trial court has large discretion as to the form and character of questions that may be asked a witness, and while as a general rule leading and suggestive questions should be disallowed, yet the subject is so far controlled by circumstances of age, understanding, and manner of the witness that leading questions will not constitute reversible error, unless it very clearly appears that there was such an abuse of discretion as amounts to substantial injustice; and such is not the case in this instance. *App v. State*, 90 Ind. 73; *Chicago, etc., R. Co. v. Long*, 16 Ind. App. 401.

4. Complaint is made of the admission in evidence of the following questions and answers, addressed to the plaintiff's wife: "How long did your husband make this complaint of pain? A. He was in bed five weeks, complaining of his head and foot. What, if any complaint, does he now make of his foot? A. He still has such pain in his foot that he can't stand on it. What complaint, if any, does he make of his back? A. He complains now of having pain in his back, way down." The contention is that complaints of pain made to one not the attending physician, at a time so remote from the injury as not to be a part of the *res gestae*, is hearsay, and therefore not admissible. The rule is otherwise in this State. *Louisville, etc., R. Co. v. Miller*, 141 Ind. 533, and cases there collected. See, also, Greenleaf, Evidence (16th ed.), §162b; 15 Am. & Eng. Ency. Law (2d. ed.), 315.

5. The second instruction given to the jury is complained of. It is in substance as follows: A higher degree of care is required of a street car company towards passengers who are aged and infirm than towards the active and

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able-bodied, and it is the duty of such company to assist such infirm passengers—if in need of assistance—in alighting from its car when they are passengers thereon; and if it was shown that the plaintiff was a passenger on the defendant's car, and was infirm, and a cripple, and in need of assistance in alighting from the car, and the defendant knew such facts, and the defendant having stopped the car to allow the plaintiff to alight, failed and neglected to assist him, and started the car forward before the plaintiff had fully alighted, thereby throwing and injuring the plaintiff, the defendant should be found guilty of negligence.

Instructions to the jury must be confined to the issues. It is fundamental that a plaintiff can recover only upon the complaint he makes; that is, he can not complain of one thing, and recover for another. Hence in directing the jury as to the rules of law that shall guide them in reaching their verdict, the court must avoid leading them away from the issue made by the pleadings, and into giving effect to facts not in the case. If extraneous and irrelevant facts have been disclosed by the evidence which are likely to influence the jury, the latter should be admonished to disregard them; and a statement of the law relating to such irrelevant facts without limitation, and in such manner as naturally to lead the jury to believe such facts effective in the consideration of their verdict, will constitute reversible error, because inclined to mislead the jury. *Lindley v. Sullivan*, 133 Ind. 588, 592; *McKeen v. Porter*, 134 Ind. 483, 490; *Nichol v. Thomas*, 53 Ind. 42, 52; *Elliott*, Gen. Pr., §899. The propriety of an instruction is to be determined, not by whether it embodies a correct statement of the law upon a given state of facts, but whether it correctly states the law relevant to the issuable facts given in evidence on the trial.

The court clearly stepped outside the case made by the pleadings in the giving of this instruction. The sole ground

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of complaint is the untimely starting of the car before the plaintiff had time fully to alight. That the defendant failed to assist the plaintiff in leaving the car is not stated as a cause for damages, or even that such thing had occurred, and therefore, so far as it affected the plaintiff's right to recover damages, it was wholly immaterial whether the defendant did or did not assist him from the car. The record shows that considerable evidence was given, without objection, both in support and in denial of the conductor's claim that he did assist the plaintiff off the car; but the giving of irrelevant evidence without objection furnishes the court no sufficient justification for charging the jury that the defendant might be found guilty of negligence upon a state of facts not properly in the case. The natural effect of such charge is to impress the jury that the fact of assistance or non-assistance is material, and the truth may be that in arriving at their verdict the jury found the defendant guilty of negligence in failing to assist the plaintiff to alight, and free from negligence in the untimely starting of the car. We can not therefore say that the instruction was harmless.

There are verbal inaccuracies in instructions four and six which are not liable to be repeated upon a retrial of the cause, and will not, therefore, be noticed.

Judgment reversed, with instructions to sustain appellant's motion for a new trial, and for further proceedings in accordance with this opinion.

**LAKE COUNTY WATER & LIGHT COMPANY ET
AL. v. WALSH.**

[No. 19,722. Filed November 25, 1902. Rehearing denied February 3, 1903.]

MUNICIPAL CORPORATIONS.—*Property Held for Public Use.*—*Sale by City.*—Property held and used by a city for public purposes is held in trust for the inhabitants, and can not be sold or disposed of

160	82
160	100

160	82
161	321
162	44

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unless the city is specially authorized by the legislature to make such sale or disposition and thereby determine the trust. p. 39.

MUNICIPAL CORPORATIONS.—*Water-Works.*—*Electric Light Plant.*—*Property for Public Use.*—Water-works and an electric light plant constructed or purchased by the city and maintained by it for the extinguishment of fires, for domestic purposes, for lighting streets, and for use in the houses of the inhabitants of the city are to be regarded as property devoted to public use. pp. 42-45.

From Lake Superior Court; *H. B. Tuthill*, Judge.

Suit by Redmond D. Walsh against the Lake County Water & Light Company and others. From a judgment for plaintiff, defendants appeal. *Affirmed.*

Wood & Oakley, V. S. Reiter, Waller Olds and N. D. Doughman, for appellants.

W. B. Reading, B. M. Cheney and A. F. Knotts, for appellee.

DOWLING, J.—This is a proceeding to enjoin the city of East Chicago and William E. Williams, its treasurer, from paying to the appellant certain alleged water rents and charges for electric lighting; to set aside as fraudulent a deed of conveyance of a water-works plant and an electric light plant, executed by the city of East Chicago to the Lake County Water & Light Company; and for the appointment of a receiver to take possession of said water and electric light plants, and to operate them pending this litigation.

Issues were formed, and upon the trial the court found for the appellee, the plaintiff below, and, over a motion for a new trial, a judgment and decree were entered according to the prayer of the complaint.

The Lake County Water & Light Company appeals, and rests its demand for a reversal of the judgment upon the supposed errors of the trial court in overruling the demurrer to the complaint, and in denying its motion for a new trial.

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The complaint states, in substance, that the appellee was and is a property owner and taxpayer of the city of East Chicago, a municipal corporation organized under the general laws of the State of Indiana; that on January 30, 1900, the said city of East Chicago owned a water-works plant and an electric light plant and system, operating them for the convenience of the inhabitants of the said city, and the protection of their property; that prior to November 3, 1899, the said city had assumed the bonded debt of the East Chicago Light & Power Company, but that on said last named day it and its treasurer, Williams, had been permanently enjoined from paying said debt; that prior to November 9, 1899, said city had attempted to assume the bonded debt of the East Chicago Water-Works Company but that on said day said city and its treasurer had been permanently enjoined from paying the same; that afterwards, between November 9, 1899, and January 30, 1900, the mayor and common council of said city and the owners and holders of the bonds of the said East Chicago Light & Power Company, whose names were unknown to the appellee, entered into a conspiracy to defraud the taxpayers of said city, of whom the appellee was one, and by indirect means to bring about the payment of the bonded indebtedness of the said water company, and said light and power company; that in furtherance of said scheme, the said conspirators caused the said Lake County Water & Light Company to be organized as a private corporation; that on January 30, 1900, the said city, by its mayor and common council, conveyed the said water-works plant and electric lighting plant by deed to the said Lake County Water & Light Company, and put the said grantee in possession of the same; that the said conveyance was by quit-claim deed, and the consideration named therein was \$60,000; that the property so conveyed included not only the land occupied and used for said plants, but also all the

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buildings, rights of way, street plants, and other property and appliances of said water-works and electric light companies, all of which were subject to a bonded indebtedness aggregating \$60,000; that a pretended appraisalment of the said property was made, but that it was irregular and void; that the only consideration for such conveyance was the assumption by the said Lake County Water & Light Company of the said bonded debts of the said water and electric light companies; that, to carry out the design of the said conspirators to subject the said city of East Chicago to the payment of the said bonded debts of the said companies, an ordinance was passed by the mayor and common council of said city granting to said Lake County Water & Light Company a franchise to maintain and operate said water-works plant for a term of thirty years, and binding said city to pay to the said Lake County Water & Light Company \$1,480 per annum, in twelve equal monthly instalments, for hydrant rentals for ninety-five hydrants; that an ordinance was also passed by the said mayor and common council granting to the said Lake County Water & Light Company a franchise to maintain and operate said electric light plant for a term of ten years from January 30, 1900, and binding said city to pay to the said Lake County Water & Light Company \$4,840 per annum, in monthly instalments, for lights for the public use; that all of said proceedings were part of a subterfuge by which said conspirators sought to evade the injunction before that granted against the said city prohibiting it from paying the said bonded debts of the said East Chicago Water-Works Company and the East Chicago Light & Power Company; that since January 30, 1900, Williams, as city treasurer, has paid out \$4,840 in obedience to the order of the common council of said city of East Chicago, and in furtherance of the said scheme of the said conspirators to pay off the bonded debts of the said

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East Chicago Light & Power Company and the East Chicago Water-Works Company, and is about to pay the further sum of \$1,260 to said Lake County Water & Light Company; and that, unless enjoined, he will continue to pay the sum of \$1,260 per annum for a term of ten years, and the sum of \$873.33 $\frac{1}{3}$ per annum for the further term of twenty years after said term of ten years; that the Lake County Water & Light Company, its officers and agents, threaten, if proceedings are taken against it, to enjoin the payment of said monthly rentals and charges, to shut down the said two plants, and to apply to the circuit court of the United States for the district of Indiana at the city of Indianapolis for the appointment of a receiver; and that the closing of said plants, even for a short time, would cause irreparable damage to said city of East Chicago and its inhabitants; and that the said Lake County Water & Light Company is, and always has been wholly insolvent. Copies of the several ordinances referred to, and of the deed mentioned in the complaint, were filed with and made parts of that pleading. Prayer for a temporary injunction restraining the city of East Chicago, and its treasurer, from paying said rentals and charges, for a judgment setting aside the said deed from the city of East Chicago to the said Lake County Water & Light Company, the appointment of a receiver to take charge of and operate said water and light plants pending this litigation, and that on the final hearing the injunction be made permanent.

It is not alleged that the city of East Chicago is indebted beyond the constitutional limit, or in any amount whatever. There is no averment of the value of the water and electric plants. Neither is there any charge that the rentals agreed to be paid by the city for fire hydrants and for electric lighting are unreasonable, nor that the city could obtain such service for lower prices, nor that it could oper-

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ate the plants itself, and supply the city with water and light at less cost. The nature and terms of the judgment alleged to have been rendered enjoining the city from assuming the bonded debts of the East Chicago Water-Works Company and the East Chicago Light & Power Company, are not set out. The connection of the East Chicago Water-Works Company and of the East Chicago Light & Power Company with the property alleged to have been owned by the city of East Chicago and conveyed by it to the Lake County Water & Light Company, is not disclosed by the complaint. Nor do we think that the averments of the complaint are sufficient as a charge of fraud against the city, its treasurer, and common council, and the East Chicago Light & Power Company. The allegations of the complaint are not nearly so full and particular as could have been wished, and, in view of the omissions we have pointed out, the question as to the sufficiency of that pleading is reduced to very narrow limits.

The propositions of law stated by counsel for appellee, by which they seek to sustain the complaint, are these: "(1) Under the provisions of the State Constitution, a municipal corporation can not for any purpose, or in any manner, become indebted to an amount exceeding two per cent. of the value of its taxable property. (2) The common council of a city can not sell or transfer property held by it for public uses or governmental purposes. Water-works and electric light systems belong to this class. (3) Public policy forbids that property held by a municipal corporation for public uses or for governmental purposes shall be sold to satisfy debts of the city." The fourth, fifth, sixth, seventh, eighth, ninth, and eleventh propositions relate to the constitutional limitation of the right of a city to become indebted. "(10) Grants by legislature to a corporation, whether public or private, will be strictly construed." "(12) The fact that water rentals are col-

lected by a city from private concerns does not constitute 'engaging in business for gain or profit.' "

The first, fourth, fifth, sixth, seventh, eighth, ninth, and eleventh propositions are wholly unimportant, and may be laid out of the case, for the reason, before stated, that the complaint contains no allegations to which they apply. On the other hand, if all of the positions assumed by the appellant should be conceded, still the complaint would be sufficient if a city organized under the general statutes of this State has not, in the absence of special legislative authority, the power to sell property held by it for public uses, and if the water-works and electric light plant, mentioned in the complaint, were so held by the city of East Chicago.

In determining the question whether cities are authorized to sell and convey property held for public uses or purposes, we must be governed by the rule laid down in *Pittsburgh, etc., R. Co. v. Town of Crown Point*, 146 Ind. 421, 422, as follows: "Doubtful claims to power or any doubt or ambiguity in the terms used by the legislature are resolved against the corporation. *Minturn v. Larue*, 23 How. (U. S.) 435; *Bloom v. Xenia*, 32 Ohio St. 461; *Ravenna v. Pennsylvania Co.*, 45 Ohio St. 118, 12 N. E. 445; *Cooley*, Const. Lim., 233, 234; 1 Dillon, Mun. Corp., §§89-91; *Tiedeman*, Mun. Corp., §110."

The statutes bearing upon the question of the power of cities incorporated under the general laws of this State to sell property held by them are the following: Section 3548 declares that any city owning real estate shall have power to sell and convey the same as the common council may deem expedient. Section 3549 provides that such sale must be authorized by a vote of two-thirds of the members of the common council. Section 3550 requires that the real estate to be sold shall first be appraised by three disinterested freeholders of such city, to be appointed by

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the judge of the circuit court of the county in which such city is situated. Section 3541, clause 45, authorizes the city to purchase, hold, or convey real estate for the purpose of constructing public buildings thereon, or using the same for a public park, or other public purpose. Section 3541, clause 47, provides that the common council may, upon the petition of a majority of the legal voters of the city, sell any public square or public landing of such city, or part thereof, and convey the same by deed; the moneys arising from such sale to be deposited in the city treasury to be expended in the purchase of any other public square, or public landing, and for the improvement of the same. Section 3550a (Acts 1895, p. 151) gives to the common council of certain small cities the power, by a vote of a majority of its members, to sell and convey to any corporation or body politic any public square, market square, market-place, fractional piece of ground, or public park, owned or held by such city, or within its corporate limits, to be held by such corporation or body politic, and devoted to any public purpose. §§3548, 3549, 3550, 3541, clauses 45, 47, 3550a Burns 1901, §§3111, 3112, 3113, 3106 R. S. 1881 and Horner 1901.

The first three of the sections above referred to evidently relate to real estate held by the city for private purposes only. None of the other enactments purports to authorize the sale of any property held for public use, except such as is expressly mentioned in their provisions. These statutes clearly indicate that the power of a city to sell property devoted to any public use is restricted, and that, to enable a city to make a sale of such property, special authority must be granted to it by the legislature. Property so held is held upon a trust for the benefit of the inhabitants of the city; and the city as the trustee for such use can not, by its unauthorized act, destroy the trust. This principle was recognized by this court in *City of Fort Wayne v. Lake Shore, etc., R. Co.*, 132 Ind. 558, 563, 18 L. R. A.

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367, 32 Am. St. 277, although the *dictum* on that subject was not, perhaps, necessary to the decision of the case. The facts were that the city of Ft. Wayne owned in fee, and subject to no conditions, a tract of land contiguous to its corporate limits, which it had purchased with the intention of using as a public park, but which had not yet been dedicated to that purpose. The city granted to a railroad corporation a portion of this tract, on certain conditions, which were supposed to be beneficial to the city. Subsequently the common council passed a resolution attempting to rescind its former proceedings, upon the ground, among others, that the city had no power to bargain away lands purchased for a public park. The action was brought by the successor of the railroad company to which the conveyance of the land had been made to enjoin the city from opening a street across said land, as the property of the city. In deciding the case, this court said that while the general rule is that municipal corporations possess the incidental right to dispose of the property, real and personal, of the corporation, of a private nature, unless restrained by charter or statute, yet they can not dispose of property of a public nature in violation of the trusts upon which it is held. The sale of the land by the city was sustained for the reason that although it had been purchased for the purposes of a public park, no steps had been taken to dedicate or apply it to that use. We find no conflict between the views expressed in the case just cited and the decision in *City of Terre Haute v. Terre Haute Water-Works Co.*, 94 Ind. 305. In the latter case, the city sold no property held for a public use, but disposed of shares of stock held by it in a private corporation. Indeed, the rule now under consideration is impliedly recognized. The court say: "The right to sell property *not held for a public purpose* is an incidental power inherent in all corporations public or private, unless withheld by the law under which they were organized."

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In the case of the *Huron Water-Works Co. v. City of Huron*, 7 S. D. 9, 62 N. W. 975, 30 L. R. A. 848, 58 Am. St. 817, the court, in a very carefully prepared opinion, and after an exhaustive discussion of the question by counsel, held that the water-works of the city, constructed under a power conferred upon the city by its charter to construct and maintain water-works for protection against fires, and for furnishing the inhabitants thereof with a supply of pure water for domestic purposes, and constructed and maintained at the expense of the inhabitants of said city, were held as the property of the municipal corporation for public use, and charged with a public trust, of which the inhabitants of said city were the beneficiaries. Being so held, the court decided that the duty of the municipality as trustee of such public trust could not be discharged and devolved on another by a sale of such water-works by the city's common council, without legislative authority.

The supreme court of Utah, in *Ogden City v. Bear Lake, etc., Co.*, 16 Utah 440, 52 Pac. 697, 41 L. R. A. 305, declared that the provision of the charter of Ogden City, authorizing it to lease, convey, and dispose of property, real and personal, for its benefit, did not authorize it to lease or otherwise transfer its water-works system or its water right used in supplying its inhabitants with water. A special provision was held necessary to authorize the transfer of property so used.

In *Pike's Peak Power Co. v. City of Colorado Springs*, 105 Fed. 1, 44 C. C. A. 333, it is said that the water system and other public utilities of a city are held by the municipality and its officers in trust for the public purposes for which they were acquired and dedicated. The city and its officers may not renounce this trust, disable themselves from discharging it, or so divert or impair the public utilities that they become inadequate to accomplish the public purposes for which they were created.

A municipal corporation has no implied authority to dispose of lands which have been conveyed to it for the public benefit. *Tiedeman, Mun. Corp.*, §229. Upon the same principle it has been held in many cases, in this and other states, that the property of a public corporation dedicated to or used for public purposes can not be sold under any legal process. *Lowe v. Board, etc.*, 94 Ind. 553, and cases cited. "Where property is owned by the corporation for any public use, or in trust, such as public buildings, fire engines, water-works, hospitals and sanitariums, the property cannot be reached by the writ of execution, and, as a necessary consequence of that conclusion, the judgment lien will not attach to such property." *Tiedeman, Mun. Corp.*, §212.

It seems clear, upon the soundest reasoning and from the great weight of authority, that property held and used by a city for public purposes is held in trust for the inhabitants, and can not be sold or disposed of unless the city is specially authorized by the legislature to make such sale or disposition and thereby determine the trust. We find no such authority to dispose of property subject to a public use in the statutes of this State, except in the particular case referred to in §§3541, clause 47, 3550a Burns 1901 (*Acts 1895, p. 151*), and this act applies only to cities having a population of less than 2,200.

The remaining question is whether water-works and an electric light plant constructed or purchased by the city and maintained by it for the extinguishment of fires, for domestic purposes, for lighting the streets, and for use in the houses of the inhabitants of the city, are to be regarded as property devoted to a public use. Among the enumerated powers of cities under the general statutes of this State is the right to construct and establish works for furnishing the city with wholesome water. §3541, clause 26, Burns 1901, §3106, clause 26, R. S. 1881 and Horner 1901. And any city having a population of more than 5,000 may pur-

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chase water-works owned by any person, corporation, or company. §§4272a, 4272e Burns 1901. So, too, full authority is given to cities to construct, own, and operate gas-works and electric light plants for the purpose of lighting their streets and alleys, and furnishing light to their inhabitants. §§3541, clause 28, 3543a *et seq.* Burns 1901; §4301 Burns 1901 (Acts 1883, p. 85).

The right to furnish water for protection against fire, to clean the streets, to flush sewers, and for the supply of the inhabitants, and the right to light the streets and public places, and to furnish gas or electricity to the inhabitants, are among the implied and inherent powers of a municipal corporation for the protection of the lives, health, and property of the inhabitants of the city, and, as to the lighting, as a check on immorality and crime. Unquestionably, these are public purposes. *Corporation of Bluffton v. Studabaker*, 106 Ind. 129; *City of Crawfordsville v. Braden*, 130 Ind. 149, 14 L. R. A. 268, 30 Am. St. 214; *Foland v. Town of Frankton*, 142 Ind. 546; *Town of Gosport v. Pritchard*, 156 Ind. 400.

It is said in *Huron Water-Works Co. v. City of Huron*, 7 S. D. 9, 62 N. W. 975, 58 Am. St. 817, 30 L. R. A. 848: "It is difficult to perceive upon what principle a distinction can be made between the water-works of a city, constructed at the expense of the corporation and used to supply water for fire purposes, domestic use, and other city purposes, and public parks, squares, fire apparatus, public buildings, etc., used for public purposes, and the courts in the later decisions seem to make no such distinction."

Again, Mr. Tiedeman states that: "As long as the government exercises the right directly and for the state's immediate benefit, no difficulty is experienced in determining what is a public use. There can be no doubt that land is devoted to a public use, when it is taken for the purpose of laying out parks, and public gardens, for the construction of public buildings of all kinds, water-works, aqueducts,

drains, and sewers, and the building of levees." Tiedeman, Mun. Corp., §234, and cases cited in note 2.

In *City of Rochester v. Town of Rush*, 80 N. Y. 302, the court of appeals uses this language: "I am unable to perceive that in any sense the water-works can be regarded as private property of the city as distinguished from property held by it for public use. These considerations lead to the opinion that the property was not taxable, and that the proceedings upon the part of the assessors of the town of Rush in regard thereto, cannot be sustained."

In *Town of West Hartford v. Board, etc.*, 44 Conn. 360, the court expressed itself thus: "The introduction of a supply of water for the preservation of the health of its inhabitants by the city of Hartford is unquestionably now to be accepted as an undertaking for the public good in the judicial sense of that term; not indeed as a discharge of one of the few governmental duties imposed upon it, but as ranking next in order. For this purpose, the legislature invested the city with a portion of its sovereignty, and authorized it to enter within the territorial limits of West Hartford and condemn by process of law certain lands therein for the purpose of storing water for its own inhabitants. It authorized the assessment of a tax upon property within the city of Hartford for money wherewith to pay for this land, because the taking and holding was for the public good." To the same effect are the following cases: *Smith v. Nashville*, 88 Tenn. 464, 12 S. W. 924, 7 L. R. A. 469; *Meriwether v. Garrett*, 102 U. S. 473, 26 L. Ed. 197; *New Orleans v. Morris*, 105 U. S. 600, 26 L. Ed. 1184.

In our opinion, water-works and electric light plants held, owned, and maintained by cities, as were those described in the complaint, must be regarded as property held in trust for a public use. Nor do we think they lose that character by reason of the fact that water and light are supplied to the inhabitants for domestic purposes, and that rentals and charges are paid for the same. As far as the

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allegations of the complaint were material, they were sustained by the proof.

It follows from what we have said that the demurrer to the complaint was properly overruled, and the motion for a new trial denied.

We find no error. Judgment affirmed.

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INDIANAPOLIS UNION RAILWAY COMPANY.

[No. 19,691. Filed February 4, 1903.]

160	45
162	44
160	45
163	588

MANDAMUS.—*Demurrer to Alternative Writ.*—The question raised by a demurrer to the alternative writ is not whether the relator, under the fact, is entitled to some form of relief, but whether he is entitled to the specific relief prayed for. *p. 46.*

MUNICIPAL CORPORATIONS.—*City of Indianapolis has no Power to Require Elevation of Railroad Tracks.*—Under the provisions of §23 of the Indianapolis city charter (§3794 Burns 1901), by which the city of Indianapolis is empowered to declare by ordinance what shall constitute a nuisance, to prevent the same, require its abatement, and to require railroad companies to change the grade and crossings of their respective roads, and to raise and lower their tracks to conform to any grade which may be established, the city has no power to enact an ordinance requiring all railroad companies operating within the city limits to elevate their tracks over all streets within a certain described district. *pp. 53-57.*

SAME.—*Power of City.*—Municipal corporations can do no act for which authority is not expressly granted or may not be reasonably inferred or implied. *pp. 57, 58.*

SAME.—*Nuisance.*—*Power of City to Define.*—The general authority granted by a city charter to declare what shall constitute a nuisance does not empower it to declare anything to be a nuisance *per se* which in fact was not recognized as such by the common law. *pp. 58, 59.*

From Superior Court of Marion County; *Vinson Carter*, Judge.

Mandamus by the State, on the relation of the city of Indianapolis, against the Indianapolis Union Railway Company to compel the elevation of tracks. From a judgment sustaining a demurrer to the alternative writ, relator appeals. *Affirmed.*

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J. W. Kern, J. E. Bell and E. D. Salsbury (amicus curiae), for appellant.

Albert Baker and Edward Daniels, for appellee.

JORDAN, J.—The State of Indiana, on the relation of the city of Indianapolis, instituted and prosecuted this action in the lower court for a writ of mandamus, seeking thereby to coerce appellee, a corporation owning and controlling a series of railroad tracks in said city, to elevate its tracks at and between certain street crossings. An alternative writ of mandate was issued upon the petition filed. This writ contained all of the material facts averred and set out in the petition. The writ, as issued, commanded the defendant to commence, without delay, the work of removing its railroad tracks where the same crossed the streets named, and in lieu thereof to construct elevated railroad tracks “in such a manner as not to interfere with public travel on any of the streets named, and in compliance with the provisions of the ordinance of the common council of the city of Indianapolis, passed on the 23d day of August, 1899.” In response to the alternative writ the appellee, defendant below, appeared and demurred thereto for insufficiency of facts. The demurrer was sustained, and judgment was rendered against the relator.

Error is assigned on the ruling of the court in sustaining this demurrer, and the question presented in this appeal for our decision is, do the facts contained in the alternative writ entitle the relator to the specific right which it claims, or do they justify the command or order of the alternative writ? For the rule is well settled in mandamus proceedings that on a demurrer to the alternative writ the question presented or raised is not, as is the case in an ordinary action, whether the relator under the facts is entitled to some form of relief, but the question raised is as to whether he is entitled to the specific relief prayed for; or, in other words, can the specific order or command of the alternative writ, under the facts therein averred, be justified. *Vide*

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Merrill, Mandamus, §§255, 256, and cases cited in support of the text; *Applegate v. State, ex rel.*, 158 Ind. 119; *State, ex rel., v. Commercial Ins. Co.*, 158 Ind. 680, and cases cited.

The following are, in the main, the facts set out in the alternative writ: There is a terminal of some fourteen railroads within the city of Indianapolis, which is an incorporated city and contains a population of more than 100,000, and is acting under and controlled by the provisions of an act approved March 6, 1891 (Acts 1891, p. 137), commonly known as the Indianapolis charter. The defendant is a corporation organized and incorporated pursuant to the statutes governing the incorporation of union railway companies, and is now and has been for many years engaged in maintaining a union railway station in said city, and owning and controlling numerous railroad tracks in said station, extending east and west therefrom through a populous part of said city, across Meridian, Pennsylvania, Delaware, Alabama, New Jersey, and East streets on the east, and Capitol avenue, Senate avenue, and other streets on the west; that passing over said tracks extending to the east of said Union Station are all the passenger engines and tenders, and all the passenger, baggage, express, and mail cars run and operated in and through said city, by the following lines of railway: Here follows an enumeration and statement or description of nine divisions of railroads which run into and through the city of Indianapolis. It is alleged that not less than eighty passenger trains, operated by the various companies named, pass over the said tracks of defendant, which run east from said Union Station, every twenty-four hours, which trains run at a high rate of speed, and cross the streets named, and that during certain times named the intervals between the passing of such trains are very short. The time of arrival and departure of all of these several trains at and from the Union Station is here set out; that passing over the tracks extending west

from said station are all the passenger trains of the following lines of railroad: (a) The Chicago division of the Big Four Railway Company, a thoroughfare extending from Indianapolis to Chicago, and connecting with the various other divisions of said road centering in Indianapolis. (b) The Peoria division of said Big Four Railway Company, extending from Peoria, Illinois, and connecting at Indianapolis with the other divisions of that railroad in said city. (c) The St. Louis division of said Big Four Railway Company, extending from Indianapolis to St. Louis. (d) The Terre Haute & Indianapolis (commonly called the Vandalia) Railroad, which connects Indianapolis and St. Louis. (e) The Indiana, Decatur & Western Railroad, which runs from Indianapolis to Decatur, Illinois, having eastern and western connections at terminal points. (f) The Indianapolis & Vincennes Railroad, operated by and as a part of the Pennsylvania railroad system, extending from Indianapolis to Vincennes, having connections with other points.

That not less than fifty-seven passenger trains, operated by the several companies named, arrive and depart from the west end of said station every twenty-four hours, many of them at short intervals, crossing Capitol avenue and Senate avenue at a high rate of speed; that the tracks over which said trains are run extend in a general easterly and westerly direction through the central part of said city; that the population of said city when said tracks were first laid was not to exceed 20,000; that said population is now about 180,000; that the principal thoroughfares of said city connecting that part of the city south of the tracks with that part lying to the north thereof are the above named streets, which are crossed by the tracks aforesaid; that the part of the city devoted to mercantile business, both wholesale and retail, is situated north of the tracks, while on the south side thereof there are large factories, and at least one-third of the entire population of said city resides

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on that side; that the streets so crossed by said tracks are constantly used by the people of said city in passing backwards and forwards between the different parts thereof, from factories to stores, and from residences to places of business, such streets being the principal thoroughfares for public travel; that in the necessary and proper movement of the people of said city in the transaction of their daily business, in the attending of schools by children, and the attending of churches and other public places by all, large numbers of men, women, and children are each day and night required to travel upon said streets where the same are crossed by defendant's tracks, and that no less than 40,000 people are compelled to and do pass daily on and over said tracks, such travel being by pedestrians and those driving in wagons and other vehicles; that when the trains aforesaid are running across such streets at the intervals above set out, some arriving and others departing, the engines emitting large volumes of smoke, the bells thereof ringing, the whistles thereon sounding, and all running at high speed, there is constant danger to the lives of all persons who are traveling in and upon any of such streets at such points of crossing; that within two years last past many inhabitants of said city have been killed at such crossings, and many more seriously injured, by engines and cars running upon and against them while they were endeavoring to travel in said streets, as they had the right to do, at the points aforesaid; that by reason of the increased and increasing volume of railroad traffic, the necessity for more engines and cars, the more constant use of said tracks is constantly increasing, while by reason of the increase in the population of said city, on both sides of said tracks, the necessity for more travel across such tracks is also constantly increasing, so that dangers to life and property by reason of such crossings are also increasing in corresponding proportion to

such increase of railway traffic and population; that the continued existence of such tracks upon and over the streets named has become and is wholly inconsistent with the use of said streets for public travel, and said continued existence is a constant menace to the lives of all the people using the same at the points aforesaid; that it is necessary, in order to make such streets and highways at such crossings reasonably safe for the inhabitants of said city making proper use thereof, and for property being conveyed along the same, and to restore said streets so occupied by said tracks so that they may be safe and convenient for public travel, that the surface of said streets should not be occupied by such tracks, or any tracks used for the passage of locomotive engines and railroad cars propelled by steam, and that such railway tracks should be removed from the surface of such streets with all reasonable dispatch; that the common council of said city, on August 23, 1899, recognizing the evils, hereinbefore recited, attempted to remedy the same by the passage of an ordinance entitled: "An ordinance for the restoration of highways and streets in the city of Indianapolis, whose surface is occupied by railroad tracks, by the removal of such tracks, and for the removal of railroad tracks from the surface of streets and highways in such city; providing penalties for its violation, and fixing a time when the same shall take effect," which ordinance, being properly approved, took effect, and is now in force; that by reason of the facts hereinbefore recited and stated the city ordinance under its terms declares the railroad crossings in said city to be nuisances, and that the continuation of such crossings at grade is entirely inconsistent with the use of such streets for travel by the public, and the ordinance among other things provides: That all railroads and railroad tracks and structures upon the surface of the streets and highways, within a designated territory in said city, called the first district, which district included all the streets and crossings described in the

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complaint and writ, should be removed therefrom on or before the 1st day of September, 1901, and should not thereafter be relaid; that every railroad track existing or being upon any public street or highway at grade, contrary to the provisions of said ordinance, is declared to be a nuisance, the same being a menace to life and property therein, and a serious interference with the comfort, safety, and convenience of the public; that after the time therein limited for the removal of such tracks, the board of public works of said city shall be authorized and directed to cause the same to be removed and abated; that any corporation, person, or persons, who should construct, operate, or maintain any railroad tracks upon the surface of streets, contrary to the provisions of such ordinance, should be liable to a penalty of \$200 per day; and said ordinance also provided that, subject to the limitations, conditions, reservations, and exceptions contained therein, "the consent of the common council is hereby given to all persons and corporations now owning or operating any railroad or railroad tracks upon the surface of any of the streets or highways, within the limits of said city, heretofore constructed upon or across the same, in pursuance of lawful authority, to construct, maintain and operate elevated railroads in lieu thereof." That among the conditions imposed by said ordinance upon which such railroad companies might maintain elevated tracks in lieu of the tracks at grade, as at present, was the condition, "that the work of constructing each of said elevated railroads within said first district shall be commenced not later than the 1st day of April, 1900, and completed not later than the 1st day of September, 1901," and the further condition, "that each person or corporation desiring to construct any elevated railroad shall first submit plans and specifications therefor to the board of public works for its approval, and that the construction of such elevated railroads shall be upon plans and specifications approved by said board, and not other-

wise." Under the ordinance in question the railroad companies are authorized and required to construct elevated tracks and roadbeds, and it is provided that such roadbeds and tracks shall be upheld by iron and steel cross girders, these to be supported by iron and steel posts. The girders are required to be fully fourteen feet above the established grade of the streets, and the roadbeds and tracks are to be so elevated as not to interfere with the travel of the public upon the streets. The ordinance goes into detail as to the manner of constructing the elevated tracks, and as to the rights of the companies to construct, maintain, and use telegraph, telephones, and signal service for their own exclusive use along and upon said elevated railroad. It further provides: "That the persons or corporations constituting or owning any elevated railroads in pursuance hereof, as well as their lessees, successors, and assigns, shall forever indemnify and save harmless the city of Indianapolis from any and all damage, judgments, decrees, costs, and expenses for which it may be made liable, or which may be recovered against it by reason of its having consented to the construction, maintenance, or operation of such elevated railroads." This ordinance is set out and made a part of the petition and alternative writ. It is further alleged in said writ that after the 1st day of April, 1900, a written demand was made upon the defendant and all railroad companies running trains over the tracks in question, requesting and directing them to proceed with the work of constructing elevated tracks in lieu of the tracks now maintained by them, and each of them, but that each and all of said companies have failed and refused to comply with said request and demand; that defendant and all said companies have failed to submit to the board of public works of said city any plan or specifications for the construction of such elevated tracks, but that, on the contrary, the defendant and all the companies owning or operating through their duly authorized agents and officers, have given out that it is their purpose

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to ignore the provisions of said ordinance, and announced their determination to continue to maintain the said tracks at grade, and to operate over and on the same the trains of cars hereinbefore described; and if said work of elevating the tracks in question, and constructing an elevated railroad in accordance with the provisions of said ordinance should be commenced at the date of the return of this proceeding, it would have to be prosecuted with extraordinary diligence to complete the same by the 1st of September, 1901; that it is the purpose of the defendant to refuse to take any steps looking to the elevation of the tracks until after September 1, 1901, and then to continue such refusal and contest the validity of said ordinance; that such delay will result in a continued loss of life and the indefinite continuation of the perils and dangers hereinbefore recited; that the construction of elevated railroads or tracks by said defendant and by said other corporations is the proper and only feasible remedy for the evils and dangers complained of which will give to the people the free, safe, and unobstructed use of their public streets and thoroughfares for travel, without in anywise interfering with the running of the trains of the said railroad companies, which are necessarily used in the transportation of passengers throughout the country.

An examination of the facts set out in the petition and alternative writ disclose that the relator does not base the right which it seeks to enforce against the appellee upon the fifth clause of §5153 Burns 1901 of the general law relating to the organization and control of railroad companies, but founds the right which it claims and asserts upon the ordinance adopted by its common council, wherein the crossings as they are maintained are declared to be nuisances. The relator, under the circumstances, then, in maintaining the right which it claims, must stand or fall upon the ordinance which it advances in support of its claim. The question, therefore, with which we have to deal, is one relating

to the power of the city under the law to adopt the ordinance involved, and thereunder compel appellee to remove the surface tracks of its railroads, and substitute instead thereof a system or series of elevated tracks in the prescribed district over which it must operate or run its cars. Counsel for appellant argue that the ordinance in question is sustained by the police power of the State, which it is said may be exercised directly by the latter, or that it may be delegated by it to municipal corporations. It may be conceded, *arguendo*, that the authority of the relator herein, if it is invested with such power to require appellee to abolish its grade crossings and elevate the tracks of its roads above the surface of the public streets in order to protect the lives and property of those using the same, rests upon the police power of the State, which the latter through its legislative department may delegate to or confer upon municipal corporations. That this power extends to and may be exercised to protect the lives and property of the people, and also to promote their health and morals, is universally recognized. That the right to exercise this power can not be bargained or bartered away, either by the State or by any of its governmental subdivisions upon which it has been conferred, is equally well settled.

In *State v. Gerhardt*, 145 Ind. 439, 33 L. R. A. 313, this court, in speaking in regard to the extent of the police power, said: "The police power of a State is recognized by the courts to be one of wide sweep. It is exercised by the State in order to promote the health, safety, comfort, morals, and welfare of the public. The right to exercise this power is said to be inherent in the people in every free government. It is not a grant, derived from or under any written constitution. It is not, however, without limitation, and it can not be invoked so as to invade the fundamental rights of a citizen. As a general proposition, it may be asserted that it is the province of the legislature to decide when the exi-

gency exists for the exercise of this power, but as to what are the subjects which come within it, is evidently a judicial question."

These well settled propositions, however, do not solve the question which confronts us in this appeal, for the inquiry still remains, has the legislature delegated to or conferred upon the relator herein any such power as will authorize that which it seeks to enforce under the ordinance in controversy? Counsel for appellant refer us to §23 (§3794 Burns 1901) of the act commonly known as the charter of the city of Indianapolis. It is claimed that under the several provisions of that section ample power to deal with the problem presented has been conferred upon relator's common council. This section provides that the common council shall have power to enact ordinances for the following purposes: "To declare what shall constitute a nuisance, to prevent the same, require its abatement, authorize the removal of the same by the proper officers, and provide for the punishment of the person or persons causing, continuing or suffering the same to exist, and to assess the expenses of its removal against such person or persons, and provide for collecting such expenses either by placing the same on the tax-duplicate or by suit. * * * To secure the safety of citizens and others, in the running of trains, in or through such city; to require persons or corporations, owning or operating railroads, to fence their respective railroads, to construct cattle-guards, street crossings, and viaducts, and public roads, and to keep the same in repair and safe condition for persons on foot, in vehicles, or otherwise; to keep flagmen at railroad crossings, and provide protection against injury to persons or property from the operation of said railroads. To authorize and require railroad companies to change the location, grade and crossings of their respective railroads; to compel them to raise or lower their railroad tracks to conform to any grade which may be established by such ordinance; to compel per-

sons or companies owning or operating railroads to construct bridges, viaducts or tunnels, and approaches thereto, across their respective railroads or rights of way, at street or alley crossings; to compel railroad companies to make and keep open and in repair ditches, drains, sewers and culverts, along and under their respective tracks. To compel railroad corporations, or persons owning or operating railroads to keep gutters and street crossings clean along their right of way. To prohibit the laying of any railroad track across any street or alley or public place, without permission first obtained therefor from the department of public works, and to provide for the taking up and removing any track so laid, without notice, and charge the expense thereof against the offending person or corporation. To require any person or company, owning or operating any railroad, to take up and change the location of any railroad track or switch heretofore or hereafter laid within the limits of said city."

It can not in reason be asserted from the mere fact that the relator is invested with some of the police power of the State in regard to the running or operating of railroads within its corporate limits, that it necessarily follows, under the circumstances, that it has unlimited power to deal alike with all of appellee's railroad crossings, and confine it to the particular or specific method or means of elevated tracks to be constructed by it at all of its crossings, regardless of the existing conditions and circumstances applicable thereto, in order to afford safety or protection to the public.

In regard to the power of the State to confer or delegate the extraordinary authority which the relator, under its charter, claims to have, we need not discuss nor decide, for that is not the question herein involved.

Under the provisions of §23, *supra*, by which the relator is empowered to require railroad companies to change the grade and crossings of their respective roads, and to raise or lower their tracks in order to conform to any grade which

may be established by ordinance, certainly the broad and extraordinary power of abolishing grade crossings within the city, and compelling the companies to construct and maintain a system of elevated tracks, as exacted by the ordinance in issue, was not intended or contemplated by the legislature. It appears that in order to afford protection to the public using the streets of the city, §23, *supra*, points out, or enumerates, some of the means which the city may compel railroad companies to employ for that purpose, among which is mentioned, to keep flagmen at their crossings, and to construct bridges, viaducts, or tunnels at street or alley crossings, but there is nothing in the section to indicate that it was the legislative intent to invest relator's common council with the extraordinary power to impose upon railroad companies the duty or obligation of removing their railroad tracks from the surface of the streets where they were legally authorized to be located, and construct, in lieu thereof, a series of elevated tracks, as contemplated by the ordinance involved, over which they must run, or operate, their cars. Under the plain language of this section there is no room to work out or hold by judicial construction that the legislature intended to confer upon the relator the power, either expressly or impliedly, to compel appellee to employ the particular and specific method, regardless of all others, of elevating its railroad tracks as prescribed by the ordinance. If we entertained a reasonable doubt, which we do not, of relator's being invested with such power, we would be required under such circumstances to solve the doubt against it, and deny the existence of the power. *Pittsburgh, etc., R. Co. v. Town of Crown Point*, 146 Ind. 421, 422, 35 L. R. A. 684; *Bogue v. Bennett*, 156 Ind. 478, 83 Am. St. 212; *Dillon, Mun. Corp.* (4th ed.), §89; *City of Crawfordsville v. Braden*, 130 Ind. 149, 14 L. R. A. 268, 30 Am. St. 214; *Adams v. City of Shelbyville*, 154 Ind. 467.

The general rule is well affirmed, that municipal corporations derive their powers from the legislature, and where

a power to such corporations is expressly granted or necessarily implied or inferred it should not be defeated or denied by a stringent judicial construction, but, nevertheless, the proposition that they can do no act for which authority is not expressly granted or may not be reasonably inferred or implied is well settled by the authorities. *Kyle v. Malin*, 8 Ind. 34; *Smith v. City of Madison*, 7 Ind. 86; *Dillon, Mun. Corp.* (4th ed.), §90.

The power of relator may be conceded, *arguendo*, either under its charter law or under clause 5 of §5153 Burns 1901, where any particular railroad crossing over its public streets by reason of the peculiar or particular circumstances or conditions thereof can only be made safe for public travel thereover by elevating the tracks of the road, to compel the railroad company to discharge such duty or obligation. But certainly such authority under the existing laws can not be extended by construction so as to warrant the relator in coercing appellee to construct and maintain a system of elevated tracks for all of its various roads running into and through the city of Indianapolis. The *ultimatum* presented to appellee by the ordinance in question was to remove the surface tracks of its roads, and construct and maintain elevated tracks over all of the crossings in the prescribed district, without regard to the conditions or circumstances of any particular crossing. The same means, without distinction, were to be provided for all crossings, irrespective of circumstances or conditions. This court, in *Chicago, etc., R. Co. v. State, ex rel.*, 158 Ind. 189, quoted with approval §1107 of Elliott, Railroads, where the author says: "Each particular crossing presents different conditions, but the general rule governing all is the same, and that rule is that the company must erect whatever structures are reasonably necessary to the safety and convenience of the traveler using the crossing."

The fact that relator's common council, under the ordinance in controversy, has by its own fiat declared all of

appellee's railroad crossings to be nuisances, does not justify the demand that by reason of such declaration appellee must remove its surface tracks and construct instead thereof a series of elevated ones. The general authority as granted by its charter to declare what shall constitute a nuisance does not empower it to declare anything a nuisance *per se* which in fact was not recognized as such by the common law. Its common council, under such general grant of power, may, within recognized limits, by ordinance define or declare what things or classes of things may, and under what circumstances or conditions they may become or shall be deemed to, constitute a nuisance, and may prescribe within the authorized limit what the penalty shall be upon conviction of the offending party. Certain things by reason of their nature or character are considered by the law a nuisance *per se*, while on the other hand there are other things which may or may not be a nuisance, their character as such being a question of fact depending on the particular circumstances of the case. *City of Evansville v. Miller*, 146 Ind. 613, 38 L. R. A. 161; *First Nat. Bank v. Sarlls*, 129 Ind. 201, 13 L. R. A. 481; *Chicago, etc., R. Co. v. City of Joliet*, 79 Ill. 25; *City of St. Louis v. Heitzeberg, etc., Co.*, 141 Mo. 375, 42 S. W. 954, 39 L. R. A. 551, 64 Am. St. 516; *Dillon, Mun. Corp.* (4th ed.), §374.

Judge Dillon, in the section last cited, in considering the powers of municipal corporations to declare and abate nuisances, properly says: "Such power, conferred in general terms, can not be taken to authorize the extrajudicial condemnation and destruction of that as a nuisance which, in its nature, situation, or use, is not such."

The crossings of appellee's railroads over the public streets of the city were authorized by law, and if they are so maintained as to become nuisances that is a question of fact to be judicially determined upon a case properly presented. Counsel for appellant assert that the facts set out in the petition and alternative writ disclose such a condi-

tion of affairs which a court can not afford to tolerate. But it must be remembered that this action is not one to abate a nuisance, but is a suit wherein the extraordinary remedy of mandate is sought, and, in testing the sufficiency of the pleading, consideration must be had only for facts well pleaded and not for legal conclusions. We have previously shown that in cases of the character of the one at bar, the only province of a court is to decide whether, upon the facts alleged in the alternative writ, the relator is entitled to be awarded the specific relief or right demanded. The functions of a court are not of a legislative character, and while the state of affairs, as counsel claim, may possibly be of a very grievous or intolerate nature, nevertheless it is not in our power to declare a law under which the relator may be enabled to secure the relief which it seeks by way of the particular method which it advances and demands for the object or purpose in view. If it has unsuccessfully exercised all of the power in the premises with which it has been invested by the legislature, and believes that the only remedy for the evil complained of is to compel appellee to construct and maintain an elevated railroad within the prescribed territory over which it must run or operate its cars, then it would appear that its appeal should not be to the courts, but to the legislature for a further or additional grant of power under which the vast undertaking upon the part of appellee as contemplated by the ordinance involved could be enforced.

We have given this case a patient consideration, and have examined all of the authorities cited by appellant, and as a final conclusion we are constrained to adjudge that the relator had not, under the existing laws, the power to adopt the ordinance in question, and therefore is not entitled to the specific relief or right demanded.

The demurrer to the alternative writ of mandamus was properly sustained. Judgment affirmed.

Adams v. Adams.

ADAMS v. ADAMS.

[No. 20,016. Filed February 4, 1903.]

CONTRACTS.—*Good-Will.*—*Merger.*—A contract whereby plaintiff in consideration of the sale of certain property and business agreed not to engage in the business while defendant was engaged therein is not merged in a subsequent agreement in which defendant sold the business and good-will to plaintiff, the latter contract having reference only to the future. *pp. 61-63.*

PLEADING.—*Estoppel.*—No question of estoppel is presented on appeal from a judgment for defendant on an answer of set-off in an action for breach of contract, where the estoppel was not pleaded by plaintiff as a defense thereto. *p. 63.*

From Henry Circuit Court; *W. O. Barnard*, Judge.

Action by Henry J. Adams against William J. Adams. From a judgment for defendant, plaintiff appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

E. H. Bundy and *J. M. Morris*, for appellant.

MONKS, J.—Action by appellant on a written contract entered into between appellant and appellee on May 21, 1900, wherein appellee agreed that in consideration of the purchase from him by appellant of certain real estate and the good-will of appellee's business as a dealer in poultry, eggs, butter, and junk, that he would not engage in said business in certain territory for a period of five years, and in the event he should engage in such business, in violation of said contract, that he would pay appellant, as liquidated damages, the sum of \$1,000. It was alleged in the complaint that appellee, "on November 19, 1900, in violation of said agreement, was, and since that time, and now is," engaged in said business.

Appellee answered by way of set-off, from which it appeared that in the year 1894 appellant was engaged in the poultry business, and also in the grocery business, in the town of Newcastle, Henry county, Indiana, and that in

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December, 1894, appellee purchased from appellant his poultry business and good-will; and in December, 1895, he purchased said grocery and grocery business and good-will; in consideration of said purchase by appellee, appellant agreed that he would not engage in the poultry business in Newcastle so long as appellee remained in said business in said town, and that appellee performed all the conditions of said contract on his part; that in the spring of 1898 appellant, in violation of his said contract, engaged in the poultry business in Newcastle, and has continued therein until the time of filing said answer. It is also alleged that appellee was damaged thereby in the sum of \$8,000, which he asks to be set off against appellant's claim and judgment for the residue. Appellant's demurrer for want of facts to this paragraph of answer was overruled. A trial of said cause resulted in a judgment in favor of appellee for \$50.

The errors assigned call in question the action of the court in overruling appellant's demurrer to the answer of set-off, and the motion for a new trial.

Appellant insists that his demurrer to the paragraph of set-off should have been sustained; because the contract set forth in said paragraph of set-off was merged in the contract sued upon in the complaint, and was a settlement of all said matters between the parties to that date; citing 15 Am. & Eng. Ency. Law. 353; *McDonough v. Kane*, 75 Ind. 181. The rule is thus stated in 15 Am. & Eng. Ency. Law. 353: "Prior contracts are merged in and superseded by subsequent ones embracing the entire subject-matter; the latter being the last act of the parties must be presumed to contain and express the true meaning and intention even though the latter be of no higher nature than the former. *Stow v. Russell*, 36 Ill. 18; *Chrisman v. Hodges*, 75 Mo. 413; *Hargrave v. Conroy*, 19 N. J. Eq. 281."

The doctrine of merger has no application to the contracts mentioned in the pleadings in this case, for the reason that the contract of May 21, 1900, sued upon in the complaint,

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did not embrace the entire substance or subject-matter of the contract of December, 1895. The contract of May 21, 1900, had reference only to the future conduct of appellee, and in no way affected appellant's liability on account of his having before that time violated the contract of December, 1895.

Appellant next insists that the verdict of the jury was contrary to law, because appellee was and is, by his conduct, estopped from claiming any damages. If appellee, by conduct or otherwise, was estopped from recovering damages against appellant for his breach of the contract set up in appellee's answer of set-off, the same should have been pleaded by appellant as a defense thereto. This was not done, and no question of estoppel is before us.

What we have said disposes of all the questions presented. Judgment affirmed.

SCHAEFER v. PURVIANCE ET AL.

[No. 19,717. Filed February 5, 1903.]

VENDOR AND PURCHASER.—Deed.—Delivery.—Interest of Widow of Purchaser.—A purchaser of land held possession thereof under an executory contract for a conveyance upon the payment of the purchase price. Default was made in payment, and vendor brought suit on the purchase-money notes and filed with his complaint a deed to the property for the use of vendee upon his payment of the notes. The vendee, without consent of vendor, and without payment of the notes, took the deed from the files and caused it to be recorded. Vendor obtained a judgment foreclosing the lien of the notes against the land, without making the vendee's wife a party, and purchased the land at sheriff's sale. The vendee died without redeeming the land and his wife brought suit for partition. *Held*, that the wife had no interest in the land. pp. 64-69.

DEED.—Delivery.—Trial.—Finding.—A finding that a vendor, under an executory contract for the conveyance of real estate upon the payment of the purchase money, filed, with his complaint to foreclose, the deed he had previously prepared and tendered to the purchaser for the use of the latter, upon his payment of the purchase money, and that soon after the filing, without the consent of

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vendor, and without paying anything on the notes, the vendee took the deed from the clerk's office and lodged it for record in the recorder's office, and that there was no further delivery, sufficiently shows that there was no delivery of the deed. *pp. 69, 70.*

From Huntington Circuit Court; *J. C. Branyan*, Judge.

Suit by Catharine Schaefer against David A. Purviance and others for partition. From a judgment in favor of defendants, plaintiff appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

J. B. Kenner, U. S. Lesh and Eben Lesh, for appellant.
T. G. Smith, for appellees.

HADLEY, C. J.—Appellant sued appellees for partition of certain lots in the city of Huntington, alleging that she was the owner in fee simple of an undivided one-third of the property, and appellees the owners of the other two-thirds. Appellees jointly answered by general denial, and David A. Purviance filed a cross-complaint to quiet his title, to which appellant filed an affirmative answer. A demurrer was overruled to the cross-complaint, and sustained to the affirmative answer. Trial by the court. Special finding and conclusions of law favorable to appellees, and judgment that appellant had no interest in the property, and that she take nothing by her suit. Motions for a *venire de novo* and a new trial were overruled. Error assigned upon all adverse rulings.

In substance the special finding discloses that on May 10, 1892, David A. Purviance, being the owner in fee simple of the lots in controversy, sold them to Rudolph Schaefer, the then husband of appellant, for the agreed price of \$750, payable \$50 in cash, and the balance in two equal instalments, due May 10, 1893 and 1894, respectively. Schaefer paid the \$50 cash, and executed to Purviance his two notes, payable at a bank in this State, for the deferred payments, whereupon, in pursuance of the contract, Purviance executed to Schaefer his title bond, condi-

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tioned that upon full payment of said notes at maturity, Purviance should, upon reasonable request, execute to Schaefer, his heirs or assigns, a good and sufficient conveyance of said lots in fee simple by warranty deed. Under the contract, Schaefer took possession, and in 1893 erected thereon permanent improvements of the value of \$275. Schaefer made default in payment of the notes, and, both remaining due and wholly unpaid, Purviance, joined by his wife, signed and acknowledged a deed of general warranty sufficient to convey to Schaefer the lots in fee simple, and on April 26, 1897, tendered said deed to Schaefer, and demanded payment of said notes in compliance with his contract. Schaefer having failed to pay any part of the sum due, Purviance instituted an action against him in the Huntington Circuit Court, at the April term, 1897, on said contract of sale, and, with his complaint, filed in the clerk's office the deed mentioned above, for the use of Schaefer, upon the latter's payment of the said purchase-money notes. Shortly after the filing as above stated, Schaefer, without the consent of Purviance, and without having paid anything therefor, or any part of said purchase-money notes, took the deed from the files of the clerk's office, and caused the same to be recorded in the recorder's office of the county, and there was no other or different delivery of said deed by Purviance to Schaefer, and which deed is the foundation of the plaintiff's claim of ownership of an undivided one-third of said lots. Schaefer's wife (appellant) was not made a party to said action. Schaefer appeared and answered, and upon a trial Purviance was awarded a personal judgment against the former for \$995, and a decree impressing the lots with a lien for the amount, and an order of sale for payment thereof. No appeal was taken from the judgment and decree. At a sale by the sheriff under the decree, Purviance bought the lots in for an amount less than his judgment. There was no redemption of the prop-

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erty, and at the end of one year from the sale the sheriff executed to Purviance a deed of conveyance. Whereupon Schaefer surrendered possession of the lots back to Purviance, and thereafter asserted no title thereto. Subsequently, in June, 1900, Schaefer died, leaving appellant, as his widow, surviving. Schaefer "was probably solvent" from the date of entering into the original contract with Purviance to the time of his death, but his property was all the time heavily encumbered by mortgages and judgments. In effect the conclusion of law is that the plaintiff is not the owner of any part of the property, and therefore not entitled to partition. In his cross-complaint Purviance set up his former ownership of the lots, their sale to the plaintiff's husband, the execution of the title bond, default in payment of the purchase money, foreclosure of his lien, his purchase of the lots at sheriff's sale on the decree, the non-redemption and conveyance to him by the sheriff, with prayer that his title be quieted. In her answer to the cross-complaint appellant pleaded the purchase of the lots by her husband, the payment of the \$50 cash, and execution of notes negotiable under the law merchant for the residue, upon the maturity of which notes Purviance was to execute to her husband a warranty deed of conveyance for the lots, that Purviance did execute to her husband the deed on April 26, 1897, according to the contract; that Purviance brought suit on said notes and obtained a personal judgment for the sum due on the notes. The sum was declared a lien on the lots, which were sold by the sheriff, and bought in by Purviance. The plaintiff was not a party and did not appear. Her husband was all the time solvent, and departed this life in June, 1900. The questions raised by the exception to the conclusion of law are the same as those raised by the demurrers to the cross-complaint and answer, and they will all be considered together.

The controlling question in the case is whether appellant has any such right in the lots in controversy as entitles her

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to partition. The only claim she makes is by virtue of being the wife and surviving widow of Rudolph Schaefer. Whatever right she possesses in the property, as flowing from the marital relation, is conferred upon her by the statute, and subsists by virtue of the seisin of her husband. She can have no better right to any part of the property than her husband had. Her suit is for partition, under a claim of ownership in fee, and a fee she can not have unless it is shown that her husband was seised of the property in fee simple during the marriage. §2652 Burns 1901. This the record does not show. It appears from the special finding that appellant's husband held possession of the lots under an executory contract calling for a conveyance in fee upon his payment of the purchase price. Under his contract he had no conveyance, and could have no right to one, until he had paid the purchase money in full. The taking of the deed from the files of the clerk's office without paying any part of the purchase-money notes, and without the consent of Purviance, who had placed it there as an element of his suit, and the lodging of it for record in the recorder's office, had no effect as a conveyance, or as a delivery of the deed; and when it was accomplished the legal situation was precisely the same as before a removal of the deed from the clerk's files. *Merritt v. Temple*, 155 Ind. 497, and cases cited.

As shown by the special finding, appellant's husband never had anything more than an equitable right in the lots,—the right to demand a deed of conveyance when he had paid for them. And having been sued for his default under the contract, and appeared and filed answer, and bided the judgment of the court, it must be conclusively presumed that he availed himself of all the defenses he had, and that the judgment ordering a sale of his equity for payment of appellees' judgment was right. And the sale having been made and possession surrendered to the purchaser by appellant's husband in his lifetime, it is not perceived how

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appellant has any interest, either legal or equitable, in the lots in controversy, since her husband was not at any time during the marriage seised in fee simple, and was not the owner of an equitable interest therein at the time of his death. See §2652, *supra*; *Butler v. Holtzman*, 55 Ind. 125.

But it is argued that in the foreclosure proceeding appellant's husband had a good defense: (1) Because the purchase-money notes being governed by the law merchant, under the contract, at maturity, should have been counted as payment, entitling Schaefer to a conveyance; and (2) the judgment directing the sale of the lots in the first instance, without first exhausting Schaefer's personal property, or a finding of insolvency, was erroneous as to him, and void as to appellant, and that since appellant takes her rights by virtue of the marital relation, and not as heir, and not having been a party to the foreclosure, she is not bound by the judgment, and is now entitled to assert any right she or her husband might have asserted in the foreclosure suit. Whatever might be said of the second mentioned defense, it seems clear that appellant has no right to either. She had no vested interest in her husband's equity in the lots. The only basis for a claim had by her was a mere legal status that would confer upon her an equity in the event that her husband died the owner of his equity. Her husband, however, had full and complete power to sell and transfer his claims without her coöperation or consent, and thus forever put an end to it so far as he or his wife or widow was concerned. Appellant was not, therefore, a necessary party to an action brought against her husband affecting his equitable right, and, if admitted as a party, could have made no defense other than in the right of her husband. *Sarver v. Clarkson*, 156 Ind. 316.

The Sarver case, in its essential elements, is like this: Sarver defaulted in the payment of purchase money, and his vendor brought suit to recover the money and to foreclose his vendor's lien. Sarver's wife was not made a party.

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The vendor, having become the purchaser at the foreclosure sale, brought an action for possession against Sarver; and the latter's wife, upon her own petition, was permitted to come into the case and file a cross-complaint setting up substantially the same matters pleaded in appellants' answer to appellee's cross-complaint. This court there said: "The appellant Luella Sarver can not assail the validity of the judgment rendered against her husband. He was the proper party to that suit, and the only necessary defendant. The title acquired under that judgment by the vendor can not now be defeated by proof of facts which might have been available to the husband by way of defense, but which he failed to plead, or prove." So it may likewise be said, for the same reasons, the appellant is concluded by the judgment against her husband.

In assailing the action of the court in overruling her motion for a *venire de novo*, appellant insists that the finding is ambiguous and uncertain: (1) Because there is no finding as to the ultimate fact of delivery or non-delivery of the deed by Purviance to Schaefer; (2) because there is no finding of the definite character of the action brought by Purviance against Schaefer; and (3) because there is no finding as to whether Schaefer was and continued solvent or insolvent, at the commencement of the foreclosure. With respect to the delivery of the deed the finding is that Purviance, with his complaint to foreclose, filed in the clerk's office the deed he had previously prepared and tendered to Schaefer, for the use of the latter upon his payment of the purchase-money notes, and soon after the filing, Schaefer, without the consent of Purviance, and without paying anything on the notes, took the deed from the clerk's office and lodged it for record in the recorder's office; and there was no other or further delivery of said deed to Schaefer than as above stated. These facts, whether they are probative or ultimate, lead to a single, definite, and certain conclusion, namely, that there was no delivery of the

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deed. See authorities above cited. With respect to the second and third grounds of complaint, they relate to immaterial facts, since we have seen that appellant has no right to question the validity of the foreclosure proceedings.

We are unable to say that the verdict is not sustained by sufficient evidence.

We find no error in the record. Judgment affirmed.

BLUMENTHAL ET AL. v. TIBBITS.

[No. 19,997. Filed February 5, 1903.]

EXECUTION.—Taxes.—Payment.—Subrogation.—A complaint alleged that plaintiffs conveyed certain real estate to defendant's husband under an agreement that the latter should pay the taxes accrued thereon, and that plaintiffs were compelled to pay the same; that subsequently a judgment was obtained against defendant's husband by a third person and an execution issued thereon; that after the death of the husband the real estate was sold to the execution plaintiff who transferred his certificate of sale to defendant and she afterward obtained a sheriff's deed to the real estate "and still holds the same by virtue thereof, and not otherwise," and prayed that plaintiffs be subrogated to the former lien for taxes, and that the same be foreclosed against the property so held by defendant. *Held*, that the complaint was bad for failure to allege that defendant had any notice of the claim or lien at the time she purchased the real estate, and that she acquired title free from any prior secret equity. pp. 71, 72.

SAME.—Decedents' Estates.—The provision of §2484 Burns 1901, prohibiting the institution of proceedings against a decedent's estate for the enforcement of judgments before the end of one year from the death of the decedent, does not apply to cases where the execution was issued in the lifetime of the decedent. pp. 72, 73.

From Grant Superior Court; *Hiram Brownlee*, Judge.

Action by Morris Blumenthal and another against Addie L. Tibbits. From a judgment sustaining a demurrer to the complaint, plaintiffs appeal. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed*.

Steele, Lett & Steele and *J. A. Kersey*, for appellants.

J. L. Custer and *O. L. Cline*, for appellee.

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GILLETT, J.—Appellants filed a complaint in two paragraphs, to each of which the court sustained a demurrer, and the questions presented are as to the sufficiency of said paragraphs.

The first paragraph of complaint charges that appellants and one John C. Tibbits, the deceased husband of appellee, exchanged certain lots, respectively owned by them, by deeds executed on April 21, 1896; that, as a part of the consideration for said transfer, it was agreed that said John C. Tibbits should pay the taxes that had then accrued on the lots conveyed to him; that he subsequently refused so to do, and that appellants, in order to protect their property from sale, were compelled to and did pay said taxes, amounting to \$200.20; that subsequently the First National Bank of Marion, Indiana, recovered a judgment against said John C. Tibbits, in the Grant Circuit Court, and on the 7th day of April, 1898, caused an execution to issue thereon to the sheriff of said county; that in August, 1898, said John C. Tibbits died intestate, leaving appellee as his widow and sole heir at law; that on the 8th day of September, 1898, said sheriff levied said execution upon the lots so conveyed to said John C. Tibbits, and, on the 22d day of October, 1898, sold the same to the judgment plaintiff in said action, and executed to it a certificate of sale; that on the 18th day of October, 1899, said judgment plaintiff sold and transferred said certificate, by written assignment thereon, to appellee, who afterwards obtained a sheriff's deed for said lots, "and still holds the same by virtue thereof, and not otherwise." Prayer that appellants be subrogated to the former lien for taxes, and that the same be foreclosed against the property so held by appellee.

The second paragraph of complaint alleges the same facts as the first, except that it does not allege the obtaining of a judgment by said bank, and omits all allegations as to the proceedings thereunder, and further alleges the following facts: That immediately after the death of said John C.

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Tibbits appellants were intending and about to proceed to enforce their said claim for taxes against the property so conveyed to him, and informed appellee of their intention so to do; that she thereupon requested them to desist and refrain from so doing, and then and there promised them that if they would so desist and refrain she would pay them the amount of said taxes; that appellants accepted said promise, and, relying thereon, did desist and refrain from taking any proceedings to enforce their claim against said real estate; that appellee has failed, neglected, and refused to pay said taxes or any part thereof, to appellants, though often requested so to do. The paragraph concludes with a prayer for a personal judgment against appellee.

It will be observed that the first paragraph of complaint does not allege or show that appellee had any notice, actual or constructive, of the claim or lien of appellants at the time she purchased the sheriff's certificate, or when she took the deed for the property. We do not even find an allegation in this paragraph that John C. Tibbits was the owner of the lots at the time the execution issued or at his death. The allegation is distinct that appellee holds the lots by virtue of the sheriff's deed and not otherwise. But even if we assume from the fact that the judgment was against John C. Tibbits, that it was his interest in the lots that was levied upon and sold by the sheriff, yet, if the sale was valid, it must be presumed, in view of the silence of the paragraph upon material matters, that she acquired the title under which she holds free from any prior secret equity. *Pugh v. Highley*, 152 Ind. 252, 44 L. R. A. 392, 71 Am. St. 327; *Union, etc., Ins. Co. v. Dodds*, 155 Ind. 365.

The position is taken by appellants' counsel, however, that the proceedings of the bank subsequent to the judgment were invalid, because of the provision of the decedents' act, prohibiting the institution of proceedings before the end of one year from the death of the decedent to enforce the lien

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of any judgment, etc. §2484 Burns 1901. Waiving other possible objections to the position stated, it is sufficient to say that the prohibition mentioned is directed to the institution of proceedings, and it can not be held to apply to cases where the execution was issued in the lifetime of the decedent, because that would bring it in conflict with the provision of the civil code authorizing the sheriff to proceed under such circumstances. §802 Burns 1901. It is true that §2484, *supra*, was enacted in 1883, while §802, *supra*, was enacted in 1881, but §2484 is substantially a reenactment of §151 of the decedents' act, enacted in 1881 (Acts 1881, p. 423), and the presumption against a repeal under such circumstances is especially strong. The first paragraph of the complaint is clearly insufficient. The second paragraph of the complaint also fails to state sufficient facts. Appellee's promise does not appear to have been based on a promise on appellants' part to refrain and desist from the enforcement of their claim for any definite length of time. Said promise appears to be open to the objection that no consideration is disclosed, and also that it was a collateral, rather than an original, undertaking.

Judgment affirmed.

INGLE v. BOTTOMS.

[No. 19,985. Filed February 6, 1903.]

EASEMENTS.—*Grant.*—Where a grant is made, whatever is necessary or essential to the enjoyment of the grant is also granted. p. 78.

MINES AND MINERALS.—*Rights of Lessee.*—A grant of the right to the coal under the surface of certain real estate carries with it as a necessary incident the right not only to penetrate the surface of the soil for coal, but also to use such means and processes for mining and removing the coal from the premises as may be reasonably necessary. p. 79.

SAME.—*Lease.*—*Right to Construct Railroad Switch to Mine.*—A mining lease granting to the lessee the right to enter upon the lands described for the purpose of mining coal, and of conducting and operating to any extent he may deem advisable, but not to hold

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possession of the land "for any other purpose, except one acre, more or less, for operating the mines, and for dwellings," gives by implication the right to construct a railroad switch for the purpose of transporting the coal, and otherwise operating the mine. pp. 79, 80.

CONTRACT.—Mining Lease.—Mutuality.—A coal mining lease which provides that the mine shall be opened within one year from the date of the lease, and shall not be closed down for more than a year at a time; that the lessor shall receive 500 bushels of coal each year and a certain sum of money for each ton of coal mined, is enforceable by the lessor, and, therefore, not invalid for want of mutuality. pp. 80, 81.

INJUNCTION.—To Prevent Lessor from Interfering with Operation of Mine.—An injunction will lie to prevent the interference by the lessor with the construction of a railroad switch to a coal mine. pp. 81, 82.

From Pike Circuit Court; *E. A. Ely*, Judge.

Suit by David Ingle against William H. Bottoms. From a judgment for defendant, plaintiff appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Reversed.*

J. E. Iglehart and *Edwin Taylor*, for appellant.

E. P. Richardson and *A. H. Taylor*, for appellee.

MONKS, J.—Action by appellant against appellee. The complaint was in two paragraphs. The first was to enjoin appellee, lessor in a coal mining lease, from interfering with the construction of a railroad switch which appellant, as assignee of the lessee, in possession of the mine, was attempting or about to build upon the surface of the land near the pit-head for the purpose of removing coal mined under the lease. The second paragraph was for injunction, the same as the first, and also for specific performance. Appellee demurred to each paragraph of the complaint for want of facts, which demurrer was sustained. Appellant refusing to plead further, judgment was rendered against him.

The errors assigned call in question the action of the court in sustaining the demurrer to each paragraph of the complaint.

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It is averred in the first paragraph of complaint that appellee, the lessor, owned forty acres of land, describing it; the execution of the lease on the 24th of August, 1898, the lease being set out *in haec verba*; that the lessee "entered upon said land under said lease, and constructed a mine thereon, and has since said time mined coal from said mine, and for the purpose of reaching said mine procured the Southern Railway Company to construct a switch from its main line to a point near said mine, so as to connect said mine with a railroad switch, which is necessary for its proper operation;" that it has become necessary, in the operation of the mine by the appellant under the lease, to build the switch; that the route selected is upon the line of a watercourse which already cuts the defendant's land in two, and the building of the switch will do the appellee and his land the least possible damage; that appellee is objecting to the extension of the switch, and will, if not enjoined, interfere with and obstruct the building of it, and annoy and obstruct the men whom the plaintiff is about to put immediately upon the work; that the appellant can not build the switch without great annoyance and hindrance and interference, and, unless appellee is enjoined from interfering with the building of the switch, appellant will be unable to build the same, to his great loss and damage and irreparable injury; that the appellant has performed all the terms and conditions imposed on the lessee in the lease. Prayer for temporary restraining order and perpetual injunction, and all other proper relief.

In the second paragraph, in addition to the facts set out in the first paragraph, it is averred that the Southern Railway Company has extended its switch upon appellant's land to a point accessible to the pit-head of the mine on appellee's land; that the railroad switch is built upon appellant's land,—appellant owning the land on the west and north of the leased premises; that the pit-head is connected by a switch with the railroad switch already mentioned;

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that it is impracticable for the appellant to build the switch extension upon his own land, for the reason that such a construction would involve a crossing of a watercourse, and a long and expensive bridge and trestle, at a cost wholly disproportionate to the value of the same, and so expensive as to be impracticable; and that it has become necessary to extend the switch on appellee's land so as to make room for cars handled in the ordinary course of business in the operation of said mine under the lease; that the route selected, as aforesaid, will carry the proposed extension over the surface not to exceed three acres of appellee's land, the entire value of which does not exceed \$25 per acre, and that the same will lie upon the bank of a watercourse, and does the least possible and very small damage to the appellee's land; that appellant is entitled to the possession of the land for the purpose of extending said switch by the express terms of the lease and by necessary implication, in the proper operation of said mine, such extension being necessary to such operation; that appellee unlawfully excludes appellant from such possession, and further threatens to prevent such extension, and will, if not enjoined, interfere; that, unless he is enjoined from preventing the building of the switch upon the land sought to be occupied as aforesaid, appellant will be unable to build said extension, to his great loss and damage, and interference with and practically stopping the operation of the mine, the sale of coal, and employment of a large number of men, resulting in irreparable injury, for which appellant can not have as adequate remedy at law as in equity; that appellant has title to the said surface for the purpose of extending said switch, as aforesaid, both by express grant and necessary implication from the lease; that appellee unlawfully excludes the appellant from the possession; that appellant, by his title through the assignment of said lease from Jackson, has entered into possession of the mine under the lease, and the appellant, as Jackson's successor under the lease, has been

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recognized by the appellee, who has dealt with appellant in and concerning the payment of royalty for the same from the appellant to the appellee, which has been done; that the lease has become thereby a binding contract between the parties thereto, fully performed by appellant, and that it ought to be enforced as to the appellee, including the portion authorizing appellant to use the said surface for the extension of the switch as aforesaid. Appellant alleged other facts, but, as they do not affect the sufficiency of the other allegations of said paragraph, it is unnecessary to set them out.

The part of the lease upon which appellant bases his right to recover under each paragraph, omitting the description of the real estate, is as follows: "The party * * * [of the first part], for and in consideration of the covenant and agreement herewith on the part of the party of the second part, and \$1 paid to the party of the first part, the receipt whereof is hereby acknowledged, has granted and conveyed, and by these presents does grant and convey to the party of the second part, his heirs and assigns, the right of entering in and upon the lands hereafter described for the purpose of mining coal and of conducting and operating to any extent he may deem advisable, but not to hold possession of, said land for any other purposes, except one acre, more or less, necessary for operating said mines, and for dwellings. The said lands are situated in Pike county, in the State of Indiana, and described as follows, to wit [describing them], for the term of twenty-five years, or as much longer as the party of the second part may deem advisable, and for which the party of the second part hereby agrees and proposes to pay, or cause to be paid, to said party of the first part the following rents, to wit, the sum of two and one-half cents per ton of 2,000 lb. mine run coal and five cents per ton of 2,000 lb. lump coal to be screened over not more than one and three-quarter inch between screen bars, and

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the said sum to be paid by the 30th of the following month for all coal mined the preceding month. Except that the party of the first part agrees to allow the party of the second part the first year's royalty and rent on all coal mined free for opening said mines, commencing with date of this lease. Also said party of the second part agrees to commence and operate said mine or mines within one year from the date of this lease, or same shall become null and void; otherwise in full force. And, further, that the party of the second part shall not become liable for any damages which may occur to said party of the first part by the sinking in of any part of said lands, and the party of the second part agrees not to mine the coal out from under the present residence of the party of the first part. And, further, that the party of the second part agrees that in any event should said mines be closed down for more than one year at a time from any other cause than strikes, this lease shall become null and void, otherwise in full force. Also the party of the second part agrees to furnish the party of the first part 500 bushels of coal each year from the date of this lease." Signed by the appellee and his wife.

It is claimed by appellee that there is no ground for injunction, or for specific performance, under the facts alleged, because: (1) There is a doubt as to the construction of the contract; (2) that the injury may be fully compensated in damages. It is well settled that when anything is granted, whatever is necessary or essential to the enjoyment of the grant is also granted. *Dand v. Kingscote*, 6 M. & W. 174; *Marvin v. Brewster, etc., Co.*, 55 N. Y. 538, 558, 14 Am. Rep. 322; *Rankin's Appeal*, 1 Mona. (Pa. Sup. Ct.) 308, 16 Atl. 82, 2 L. R. A. 429; *Wardell v. Watson*, 93 Mo. 107, 111, 5 S. W. 605; *Williams v. Gibson*, 84 Ala. 228, 4 South. 350, 5 Am. St. 368; *Bainbridge, Mines*, 101, 102; 20 Am. & Eng. Ency. Law (2d ed.), 774. The rights which arise by implications under said rule are only such as are necessary to the enjoyment of the grant.

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Pettingill v. Porter, 8 Allen 1, 85 Am. Dec. 671; *Barringer, Mines*, 589. Under this rule, the grant of the right to the coal carries with it, as a necessary incident, the right not only to penetrate the surface of the soil for the coal, but also to use such means and processes for mining and removing the same from the premises as may be reasonably necessary. This includes the right to construct such roads and railroad tracks on the surface of the land as are reasonably necessary for the transportation of supplies, machinery for the operation of the mine, and for removing the coal from the mine openings. *Lindley, Mines*, §813, and authorities cited, *supra*. The question of how much of the surface is reasonably necessary for the proper operation of the mine is a question of fact, and not of law.

It was said in *Pettingill v. Porter, supra*, concerning the meaning of the word "necessary" when used in defining what rights pass by implication, that: "The word 'necessary' can not reasonably be held to be limited to absolute physical necessity. If it were so, the way in question would not pass with the land if another way could be made by any amount of labor and expense, or by any possibility. If, for example, the property conveyed were worth but \$1,000, it would follow from this construction that the plaintiff's intestate would not have the right of way over the triangular piece as appurtenant to the land, provided he could have made another way at an expense of \$100,000. If the word 'necessary' is to have a more liberal and reasonable interpretation than this, the one adopted by the judge must be regarded as correct. Its effect was to require proof that the way over this triangular piece was reasonably necessary to the enjoyment of the dwelling-house granted. See *Ewart v. Cochrane*, 7 Jur. (N. S.) 925; *Leonard v. Leonard*, 2 Allen 543; *Carbrey v. Willis*, 7 Allen 364."

Appellee insists, however, that appellant is, by the terms of said lease, restricted to the use of one acre, more or less, of said land, for the purpose of mining said coal, conduct-

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ing and operating said mines. The lease grants to the lessee the right to enter "upon the lands * * * for the purpose of mining coal and of conducting and operating to any extent he may deem advisable, but not to hold possession of said land for any other purpose, except one acre, more or less, for operating said mines and for dwellings."

It will be observed that the limitation of the right to hold possession of the land to one acre, more or less, is a limitation for other purposes than those previously recited. It is true that the words "for operating said mines," which specify the use to be made of said one acre, more or less, designate a purpose expressly granted by the lease. This renders the meaning of said clause somewhat obscure. The rule is that a lease must be construed as a whole, and such construction placed upon it as will render all of its clauses harmonious, consistent, reasonable, and just, and mutually obligatory in its provisions. Exceptions are construed against the lessor and in favor of the lessee. 18 Am. & Eng. Ency. Law (2d ed.), 617, 618, 624; 17 Am. & Eng. Ency. Law (2d ed.), 4-8, 18; Gear, Land. & Ten., §68. Applying these rules to the lease in question, it is evident that the restriction of the possession for "other purposes" to one acre, more or less, can not be held to limit the lessee's use of the surface for switches and roads to less than is reasonably necessary for the removal of the coal from said mines. To construe the reservation as controlling the entire lease, and limiting the right expressly granted, and those which would be necessarily implied in order to effectuate the purposes of the grant, would, under the allegations of the complaint, be practically to destroy the lease, and prevent appellant from carrying out the true purpose of the same by mining all the coal under the land in a businesslike manner, and paying to appellant the royalty which would thereby come to him.

Appellee insists that the lease can not be enforced against the appellant, and for that reason it lacks mutuality, and

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can not be enforced against him. The lessee is required by the contract to furnish the lessor 500 bushels of coal each year from the date of the lease, and pay a fixed price for the coal taken from the mines, and that he open up the mine or mines within one year from the date of the lease, and that said mines shall not be closed down for more than one year at a time from any other cause than strikes; all of which terms and conditions, it is alleged, have been performed by appellant. It is evident that the terms of said lease could have been enforced by appellee. There is no doubt as to the proper construction of said lease.

It was said by this court in *Xenia Real Estate Co. v. Macy*, 147 Ind. 568, 573: "That a remedy which prevents a threatened wrong is in its essential nature better than a remedy which permits the wrong to be done, and then attempts to pay for it by pecuniary damages which a jury may assess." *Denny v. Denny*, 113 Ind. 22, was an action brought by a widow to enjoin the executor from selling corn which she claimed the right to take as such widow at its appraised value, an injunction was granted by the trial court. This court in affirming the judgment said: 'If it may be conceded that the plaintiff might have maintained a suit on the bond, it does not necessarily follow that she must have permitted the corn, to which she had a clear right, to be sold. She was not bound to take the chance of obtaining other corn or leaving her animals to suffer for want of feed. * * * It is not enough that she had a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity.'" *Peoria, etc., R. Co. v. Attica, etc., R. Co.*, 154 Ind. 218, 223; *Champ v. Kendrick*, 130 Ind. 549, 553; *Bishop v. Moorman*, 98 Ind. 1, 49 Am. Rep. 731; *Erwin v. Fulk*, 94 Ind. 235; *Allen v. Windstandly*, 135 Ind. 105, 109. Under this rule it is clear from the facts alleged in each

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paragraph of the complaint that appellant has no complete and adequate remedy at law. The facts alleged were, therefore, sufficient to entitle him to an injunction. *Xenia Real Estate Co. v. Macy, supra.*

This disposes of all the objections urged against the complaint. It follows that the court erred in sustaining the demurrer to each paragraph of complaint.

Judgment reversed, with instructions to overrule said demurrer, and for further proceeding not inconsistent with this opinion.

WHITCOMB v. STRINGER, RECEIVER.

[No. 19,700. Filed February 17, 1903.]

RECEIVERS.—*Intervening Petition.*—*Answer of Set-off.*—*Dismissal of Petition.*—A trial on an intervening petition against the receiver of a building and loan association progressed to the conclusion of the evidence under an issue and agreement that permitted the giving in evidence by the receiver, as a defense, of all proper matters of set-off, but would not support a judgment over against petitioner, when the court, on its own motion, arrested the progress of the trial, and ordered the receiver to file an additional pleading in set-off, and granted an adjournment for that purpose. After adjournment, petitioner's attorney gave notice to the judge and attorneys for the receiver that he desired to file a written dismissal of his intervening petition, and, with the approval of the attorneys, agreed to meet in the court room in the afternoon of the same day and take the matter up. Upon the convening of court the receiver's attorney filed the set-off, as directed, asking affirmative relief, and the petitioner's attorney filed his motion to dismiss, which was sustained. *Held*, that the court did not err in refusing to permit petitioner to dismiss before permitting the receiver to file the answer. *pp. 87-89.*

SAME.—*Intervening Petition.*—*Trial.*—*Pleading.*—*Amendment.*—No error was committed by the court in the trial of an action on an intervening petition in a receivership in directing the receiver at the conclusion of the evidence, under the answer of general denial, to file an additional answer of set-off. *pp. 89, 90.*

SAME.—*Pleading.*—*Amendment.*—*Change of Venue.*—Where the court at the conclusion of the evidence of petitioner, in an action in a receivership case, permitted the receiver to file an answer of set-off, it was not error to deny a jury trial and a change of venue from

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the judge, the trial having been in progress for more than thirty days and there being no new issue introduced by the additional answer. *p. 90.*

QUERY.—*Receivers.—Change from Judge.*—Is an intervening petitioner in a receivership entitled to a change from the judge? *p. 90.*

TRIAL.—*Remittitur.—Judgment.*—Where in a trial by the court a general finding for a certain amount was made, it was not error to grant a remittitur of a part of the finding and render a judgment for the remainder pending a motion for a new trial. *pp. 90, 91.*

PLEADING.—*Demand.—Appeal and Error.*—An averment in answer to an action against the receiver of a building and loan association that petitioner as secretary of the association collected and received a large sum of money belonging to the association which he failed and refused to account for, or to pay over to the association or the receiver, implies a demand, and is sufficiently certain when attacked for the first time in the Supreme Court. *p. 91.*

From the Superior Court of Marion County; *Vinson Carter, Judge.*

Intervening petition by Theodore C. Whitcomb against William H. Stringer as receiver of the Eureka Savings & Loan Association. From a judgment in favor of defendant, plaintiff appeals. Appealed from the Appellate Court, under clause 3 of §1337j Burns 1901. *Affirmed.*

W. A. Ketcham and F. W. Cady, for appellant.

R. O. Hawkins and H. E. Smith, for appellee.

HADLEY, C. J.—Appellee having been previously appointed receiver of the Eureka Savings & Loan Association, appellant filed in the receivership an intervening petition for the recovery as a creditor for sums of money loaned the association, and as a stockholder to recover the withdrawal value of stock owned by him. Appellee answered the intervening petition by a general denial. On the 3d day of February, 1900, the case was called for trial before the court upon issues joined by the general denial, and before any evidence was heard it was agreed in open court, and made a part of the record, that all matters of set-off and counterclaim might be given in evidence as a defense under the general denial. The trial then proceeded and

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continued from day to day, including certain adjournments, until the 8th day of March, 1900, at about the hour of 9:30 o'clock a. m., at which time the evidence in the cause was concluded. Whereupon the court of its own motion announced that, in view of the evidence that had been produced, he deemed it a duty and did therefore direct the receiver to file an answer of set-off or counterclaim, based upon the statement of items in his report, asking a judgment over against the appellant, and to enable the latter to procure any further testimony, and to prepare and present his defense to said answer of set-off and counterclaim, the further hearing was postponed until the 26th day of March, 1900, at 9 o'clock a. m. The cause being postponed, the parties and their attorneys retired from the court room at about 10 o'clock a. m. One hour and a half later, or at about 11:30 o'clock a. m. of said 8th day of March, appellant's attorney returned to the court room. Prior to his return, the court had concluded its business for the morning session, and the judge had left the bench, and retired to his private room adjoining the court room, and was there engaged at work in chambers. Appellant's attorney entered said private room, and addressing the judge informed him that he desired to file in court a written dismissal of the intervening petition, and that the paper which he (the attorney) held in his hand was such written dismissal; whereupon the judge requested the attorney to call up the attorneys for the receiver, and request them to come to the court room, and indicate whether or not they had any objection to the proposed dismissal. Having done as requested, appellant's attorney informed the judge that he had talked with one of the receiver's counsel, who expressed the desire to confer with his partner before answering as to the proposed dismissal, and stating that he would have such conference and appear in the court room at 2 o'clock p. m. Upon this information the judge directed said attorney to be at the court room at 2 o'clock, when

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the matter would be taken up. Thereafter, and between the hours of 12 o'clock noon and 2 o'clock p. m., the attorneys for the receiver filed with the deputy clerk an answer of set-off and counterclaim, requesting a judgment over against appellant. When this answer was filed with the deputy clerk the court was not in session; neither was the judge nor appellant, nor anyone representing the appellant, present; neither had appellant nor his attorney received notice that such answer would be filed on that day. A few minutes before 2 o'clock the attorneys of both parties assembled in the court room, and, while awaiting the arrival of the judge, appellant's attorney exhibited the prepared dismissal to the attorneys for the receiver, and immediately upon the resumption of the bench by the judge, an attorney for the receiver, addressing the court, announced that they had filed with the clerk the answer of set-off and counterclaim as directed, and asked leave to file the same in court; whereupon appellant promptly objected to the filing of such answer, upon the ground that he had dismissed his intervening petition at the morning session of the court, of which both court and counsel for the receiver had actual notice. The court overruled appellant's objection, permitted the answer to be filed, noted the filing thereof in the issue docket, and immediately thereafter entered in said docket appellant's motion to dismiss, an order of dismissal of appellant's intervening petition, and then an order requiring appellant to reply to the answer by 9 o'clock March 26. April 18, appellant filed a reply. April 25, he offered to file a motion and affidavit for a change of venue from the judge, and this being refused, on the ground that the motion came too late, he thereupon offered to file his written request for a trial by jury, which was also refused upon the same grounds. Trial resumed, additional evidence given, and a finding in favor of the receiver for \$12,092. Motion for a new trial and in arrest of judgment overruled. Pending the motion for a new trial, and in consideration

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thereof, the receiver, upon suggestion of the court, remitted from the amount of the finding \$2,453; whereupon the court overruled the motion for a new trial, and rendered judgment against appellant for \$9,639, the residue. Exceptions were promptly reserved upon all adverse rulings.

The propositions of alleged error are: (1) In refusing to permit appellant to dismiss his intervening petition before permitting appellee to file his set-off and counterclaim; (2) in permitting appellee to file his set-off and counterclaim after appellant had presented to the court a written dismissal of his intervening petition, and given notice to the court and counsel for appellee of his intention and desire to dismiss; (3) in refusing appellant a trial by jury; (4) in refusing appellant a change of venue from the judge; (5) in overruling the motion for a new trial; (6) in suggesting and permitting a remittitur of \$2,453; and (7) in overruling the motion in arrest of judgment.

The facts involved in the first two of the above propositions may be more concretely stated thus: The trial of the case having progressed to the conclusion of the evidence under an issue and agreement that permitted the giving in evidence by appellee, as a defense, of all proper matters of set-off, but would not support a judgment over against appellant, the court, of its own motion, arrested the progress of the trial, and ordered its receiver (appellee) to file an additional pleading in set-off, demanding therein a judgment against appellant. An hour and a half later, and after the court had finished its business for the forenoon session, and the judge had left the bench and retired from the court room, appellant gave notice to the judge and attorneys for appellee that he had prepared and desired to file a written dismissal of his intervening petition; and, with the knowledge and approval of the judge, the attorneys agreed to meet in the court room at 2 o'clock and take the matter up. They did meet, pursuant to the arrangement, and after the judge had taken the bench appellee's attor-

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ney, addressing the court, asked leave to file the answer of set-off he had been directed to file. After the filing of the answer asking affirmative relief against appellant, the latter presented to the court his motion to dismiss, which was sustained, and his intervening petition dismissed. Thereafter he was ruled by the court to reply to appellee's answer of set-off.

Under the code, a plaintiff may dismiss his action without prejudice at any time before the jury retires, or, when the trial is by the court, at any time before the finding of the court is announced. §336 Burns 1901. But in a case where a set-off has been presented, which in another action would entitle the defendant to a judgment against the plaintiff, the defendant shall have the right of proceeding to the trial of the claim, without notice, although the plaintiff may have dismissed his action. §356 Burns 1901. And it is further provided that if a set-off established at the trial shall exceed the plaintiff's claim so established, judgment shall be rendered for the excess. §580 Burns 1901.

1. The controlling question under these statutes is, was appellant's intervening petition a pending cause when appellee offered to and did file his answer of set-off and counterclaim? If it was, then the court did not err in refusing to permit appellant to dismiss before permitting appellee to file his answer. The cause was pending, unless it can be said that the preparation of a written dismissal, and notice to the court and opposing counsel of an intention and desire to file it, operated as a dismissal. The announcement of a desire to dismiss was not made by the court, but to the judge after the court had arisen for dinner and the judge had retired to his chambers. What occurred, therefore, during the noon recess, was not enacted before the court, or in pursuance of a statute or rule of the court, so far as appears.

It will not do to say that notice of intention to do a thing is equivalent to the thing done. Nor will it be

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claimed that appellant's notice to the judge and opposing attorneys so far concluded him that he had no power to recede or decline to dismiss his cause upon the reassembling of court after dinner. And if the declaration to dismiss was not binding upon appellant, we see no reason for holding that it was binding on others, or that it gave him any preferential right to claim the court's attention after noon. What was done and said by appellant and others during the noon adjournment, being out of and independent of the court, had no legal effect upon the rights of the respective litigants. It was a race of diligence with counsel, in which the information received by appellee's attorneys as to appellant's intention, coming unsought, and received without promises, can not be adjudged as impairing appellee's equal right to act with promptness upon the return of the court. Upon the judge resuming the bench at the appointed hour, appellee's attorney, in the regular course, with alertness, but without unseemly haste, so far as appears, addressed the court, and tendered the answer he had been directed by the court to file. When the proceeding opened there was no motion or request by appellant to dismiss his intervening petition pending before the court, and so far as appeared of record, and so far as the court at that moment knew, no such motion or action was extended. What else then could the court do but take notice of the presentation of the answer? If the right to have his answer filed existed at the time it was presented, the subsequent objection of appellant would not defeat that right. The filing of the answer was timely and orderly, and when appellant presented to the court his motion and request to dismiss there was then on file an answer of set-off and counterclaim which entitled the defendant to recover of appellant a judgment in another action, and which, under §356, *supra*, could not be abated by a dismissal of the original intervening petition. We must, therefore, hold that the court did not err in permitting appellee to file his answer before appel-

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lant presented his written dismissal, and did not err in refusing to permit appellant to dismiss his action before permitting appellee to file his set-off.

2. It was not error in the court, at the conclusion of the evidence under the answer of general denial, to direct its receiver to file an additional answer of set-off. It was said by this court in *Levy v. Chittenden*, 120 Ind. 37: "That justice may be done between parties, our code is very liberal in its provisions with reference to amendments, and the *nisi prius* courts are given a wide discretion in this regard. Before entering upon the trial of a cause the trial court may grant permission to the parties to amend their pleadings to almost any extent. After the trial is entered upon, and even after the cause has been finally submitted to the court or jury trying the cause, it is not error to allow amendments to conform the pleadings to the evidence, where there is no change made in the nature of the cause of action or defense. *Durham v. Feckheimer*, 67 Ind. 35; *Child v. Swain*, 69 Ind. 230; *Town of Martinsville v. Shirley*, 84 Ind. 546; *Darrell v. Hilligoss, etc., Co.*, 90 Ind. 264; *Burns v. Fox*, 113 Ind. 205." See, also, *Stanton v. Kenrick*, 135 Ind. 382.

The controversy here is over the assets of an insolvent corporation. The property and affairs of the concern were in the custody of the court for administration, and appellee was the court's receiver—its agent—its hand, to carry forward the just settlement of the company's business. The matters of set-off admissible in evidence by agreement, under the general denial, embraced more than 200 items of cash, alleged to have been received by appellant for the use of the loan association while he was its secretary, and not accounted for, which items were all set forth in the receiver's report. The set-off directed by the court, and in fact filed in pursuance thereof, was founded on precisely the same items, and no others. The new answer did not change the nature of the action or defense, and did not enlarge or

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restrict the scope of the evidence. Its only effect was to change the form of the issue so as to remove the limitation set up by the agreement, and to authorize the court, in the rendition of its judgment, to go beyond the defense, and give judgment over against the plaintiff. Under the facts, therefore, the court had the undoubted right to require its receiver so to amend the issue, in conformity to the evidence, as would enable it to render such a judgment as the proof showed the trust was entitled to recover.

3. The trial had been in progress for more than thirty days, and there being no new issue, or new questions of fact introduced by the additional answer, the court very properly ruled that it was too late to ask for a trial by jury, or for a change of venue from the judge. Besides, if these motions had been timely presented, it may well be doubted that appellant was entitled to either a jury trial or a change of venue from the judge. It is a familiar doctrine that when equity takes jurisdiction it will hold it for all purposes of the case; and the administration of an insolvent trust is so peculiarly and exclusively under the supervision of the chancellor that a settlement of rights and equities thereunder by piecemeal and by different judges would seem to lead to confusion and inequalities, and to fall within that class of cases in which a change from the judge is denied. For instance, an application to remove an administrator. See *Bowen v. Stewart*, 128 Ind. 507. But these latter questions are not necessary to a disposition of the case, and we do not decide them.

4. In a general finding, the court found against appellant in the sum of \$12,092. Pending a motion for a new trial, and in the consideration thereof, upon the suggestion of the court, appellee remitted \$2,453 of the amount found in his favor, and the court rendered judgment against appellant for \$9,639, the residue.

It is insisted that after the court had announced and entered its finding such finding stood as a verdict of the

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jury, and that the court's power over it was at an end, except upon a motion for a new trial. This is not in accordance with the recent decisions of this court. A trial judge may in all cases amend his special findings of fact and conclusions of law at any time before final judgment, and during the period within which a bill of exceptions containing the evidence may be filed. *Thompson v. Connecticut, etc., Ins. Co.*, 139 Ind. 325; *Royse v. Bourne*, 149 Ind. 187; *Jones v. Mayne*, 154 Ind. 400; *Marion Mfg. Co. v. Harding*, 155 Ind. 648. For the same reasons, and within the same limitations, the court may amend or modify its general finding, if convinced that it is incorrect. Moreover, it would be a novel ruling to hold that an act so beneficial to a litigant as a remittitur of one-fifth of the finding against him is a sufficient reason for granting the beneficiary a new trial.

5. It is argued that the motion in arrest of judgment should have been sustained, because the complaint was insufficient to sustain the finding and judgment for want of an allegation of demand. It was averred in the set-off that appellant, as the secretary of the loan association, collected and received a large sum of money belonging to said association,—a bill of particulars of which is exhibited and filed,—which sum of money he has failed and refused to account for, or to pay over to the said association or the receiver, etc.

The averment that appellant collected money belonging to appellees, which he failed and refused to account for or pay over, necessarily implies a demand. For there could be no refusal without a demand. *Snyder v. Baber*, 74 Ind. 47. At most, the averments are sufficiently certain when attacked for the first time in this court.

We find no error in the record. Judgment affirmed.

GUTHEIL v. GOODRICH ET AL.

[No. 19,469. Filed February 18, 1903.]

JUDGMENT.—*Former Adjudication.*—*Pleading.*—Where a pleading states the same facts as were set out in a former pleading in an action between the same parties in interest, their representatives or privies, suing or being sued in the same quality or character, which facts were either admitted or traversed in the former action, and it appears that there was a final adjudication of the matters in issue by a court of competent jurisdiction, then the question of the truth or falsity of the matters in issue, as between the same parties, is considered as forever settled by the adjudication upon them. *p. 95.*

SAME.—*Former Adjudication.*—*Fraudulent Sale of Corporate Stock.*—An action by the seller against the buyers of corporate stock for damages, charging fraud in procuring the sale, can not be maintained, where there has been a judgment against such seller in a previous suit by him against the buyers to rescind the sale. *pp. 93-95.*

FRAUD.—*Rescission of Sale.*—*Complaint.*—*Parties.*—*Uncertainty.*—A complaint, in a suit to rescind a contract for the sale of corporate stock on the ground of fraud, set forth conduct of the defendants which, if proved, would entitle plaintiff to a rescission, and joined as defendants the necessary or proper parties each of whom, under the allegations, would be required to answer. *Held*, that the complaint was not void for uncertainty as to parties. *p. 96.*

JUDGMENT.—*Former Adjudication.*—In a suit to rescind a contract on the ground of fraud, the court found for the defendants, and that there was no fraud. *Held*, in a subsequent action for damages by the same plaintiff against the same defendants, and based upon the same alleged fraud, that a plea of former adjudication was good, although there had been a special finding on the former trial that plaintiff had opportunity to have ascertained the facts prior to the time of the alleged fraud. *p. 96.*

From Randolph Circuit Court; *W. O. Barnard*, Judge.

Action by Charles Gutheil against James P. Goodrich and others. From a judgment for defendants, plaintiff appeals. *Affirmed.*

J. W. Ryan and *W. A. Thompson*, for appellant.

J. J. Cheney, *J. W. Macy*, *J. S. Engle* and *W. G. Parry*, for appellees.

DOWLING, J.—Suit by appellant against appellees for damages said to have been sustained by him by reason of alleged fraudulent acts of the appellees, whereby he was induced to sell and transfer to them eighty shares of the capital stock of the Rock Oil Company, owned by him. The rulings on demurrers to the special answers of the appellees are assigned for error.

The appeal was taken before the passage of the act of 1901 (Acts 1901, p. 565), and the jurisdiction of the cause is in this court by reason of the amount involved.

The substance of the complaint is that the appellant was the owner of eighty shares of the capital stock of the Rock Oil Company, a corporation organized under the laws of this State, for the purpose of drilling wells for natural gas, and to lay pipes and furnish such gas for the use of the citizens of the town of Winchester, in Randolph county, Indiana, and the vicinity of said town; that wells were drilled by said company; that the appellees, or some of them, were officers of the said company, and had special facilities for knowing the character of the wells so drilled, and the quantity of gas produced by them; that the supply of gas was ample, and the demand large, and for that reason the value of the capital stock was great; that the appellees, for the purpose of inducing the appellant to sell his stock for less than it was worth, fraudulently made to him false reports concerning the condition and flow of the wells; that they fraudulently obstructed the mains, by inserting a piece of iron at a flange joint thereof; that they falsely declared that they were disappointed in the venture, and intended to sell their stock at a reduced price, and pretended to make such sales; that appellant was ignorant of all these matters, reposed great trust and confidence in the appellees, believed and relied upon their representations, and, in consequence thereof, sold his stock for much less than it was worth; that the appellees, directly or indirectly, by their friends and relatives, became the owners of said

stock; that immediately thereafter said obstruction was removed from the mains; that said company did a prosperous business, and the value of said stock advanced to several times the amount paid to the appellant per share, and that large dividends were paid by said company; that all of said fraudulent acts were concealed from and were unknown to the appellant until long after he had transferred his stock, etc. These facts, with others of a similar nature, were stated at great length, and with much minuteness of detail in the complaint, but the foregoing abstract is sufficiently full for the purposes of this decision.

The answers of the several appellees set up substantially the same matters of defense, and the questions presented by the demurrers to them are, in legal effect, the same. Each answer alleges that before the commencement of the present action the appellant brought a suit in the Randolph Circuit Court to rescind his contract for the sale of his said stock and to recover the shares so sold; that the venue of said cause was changed to the Wayne Circuit Court; that the matters set up in the complaint in that suit,—all of which are specifically pleaded,—and those averred in the complaint in the present action are the same; that the said cause was duly tried by the court, and a special finding made, with conclusions of law thereon; that the finding and judgment in that case were against the appellant; that all the matters in controversy under the present complaint were tried and determined in the former action, and that the appellant is bound thereby. Some of the answers proceed upon the ground that by his former suit the appellant elected a different and inconsistent remedy. The others are pleas of a former adjudication.

We think it entirely clear that the supposed election of an inconsistent remedy by the appellant in the former action is unimportant, but that the question presented is whether it appears from the answers that there was a former adjudication of the matters set out in the complaint

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as the basis for a recovery of damages. The doctrine of *res judicata* covers a wide and interesting field of learning, and the cases in which it has been defined and applied are almost without number. The questions we are called upon to decide, however, are governed by one or two plain principles, which are decisive of this controversy. Where a pleading states the same facts as were set out in a former pleading in an action between the same real parties in interest, their representatives or privies, suing or being sued in the same quality or character,—which facts were either admitted or traversed in the former action,—and it appears that there was a final adjudication of the matters so in issue by a court of competent and complete jurisdiction, then the question of the truth or falsity of the matters so in issue, as between the same parties, their representatives or privies, is considered as forever settled by the adjudication upon them. And by the term, “matters in issue,” we think must be included not only the object of the suit or the particular right or defense sought to be recovered or established, but all the facts material to the issue from which such object or remedy, cause of action or defense, was deduced. *Greenup v. Crooks*, 50 Ind. 410; *Stringer v. Adams*, 98 Ind. 539; *Indianapolis, etc., R. Co. v. Center Tp.*, 130 Ind. 89; *Gilmore v. McClure*, 133 Ind. 571; *Stanton v. Kenrick*, 135 Ind. 382; *Parker v. Obenchain*, 140 Ind. 211; *Kitts v. Willson*, 140 Ind. 604; *Moore v. Horner*, 146 Ind. 287; *Thomas v. Thompson*, 149 Ind. 391; *Porter v. Fraleigh*, 19 Ind. App. 562; 21 Am. & Eng. Ency. Law, 187, 227; Van Fleet, Former Adjudication, 54. The facts averred in the complaint in this action and those alleged in the complaint in the former suit being the same, and it having been adjudged that the matters stated in the former action were not true, and that none of the fraudulent acts with which the appellees were charged were committed by them, it follows that the answers in the present suit stated a sufficient defense to the complaint herein.

The point is made by counsel for appellant that the complaint filed by him in the former action was insufficient for want of facts, and therefore that the judgment upon it was no bar to the present suit. We think otherwise. That complaint set out very clearly representations and conduct by the defendants therein which were wrongful and fraudulent, and which, if proved, would have entitled the appellant to a rescission of his contract and the recovery of his stock. It alleged, also, that the fraudulent acts by which the defendants in that suit had succeeded in obtaining a sale and transfer of his stock by the appellant had been concealed from him. These allegations were denied by the appellees, and the parties went to trial upon the issue so made. All the persons named as defendants in the first action were either necessary or proper parties. All of them appeared to be directly or indirectly implicated in the fraud alleged, and the averments of that complaint were sufficient to require an answer from each of them. We discover no reason for holding the complaint void for uncertainty as to any of the parties.

The further objection is made that it appears from the special finding in the former case that the appellant had lost his right to recover in that action, on account of his delay in bringing his suit, and that according to the rule in *Dygert v. Dygert*, 4 Ind. App. 276, the answers should have been held bad. But the record affirmatively shows that the appellant failed in his first suit because no fraud was shown which entitled him to a rescission of the contract. The special finding that he had the opportunity to ascertain the facts concerning the alleged fraud amounted to nothing, because the court found and adjudged that no fraud was practiced by the appellees. The doctrine stated in *Marshall v. Gilman*, 52 Minn. 88, 53 N. W. 811, that when the action to rescind a contract is lost by the failure of the plaintiff seasonably to avail himself of it, and by conduct respecting the subject of the action inconsistent

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with an intention to exercise that right, and amounting to an election not to do so, while sound, beyond question, does not apply to this case, for the reason that the finding and judgment was that no fraud existed.

The demurrers to the answers of the appellees were properly overruled, and we find no error in the record. Judgment affirmed.

Monks, J., took no part in the decision of this cause.

MUNCIE NATURAL GAS COMPANY v. CITY OF MUNCIE.

[No. 19,805. Filed February 18, 1903.]

MUNICIPAL CORPORATIONS.—*Fixing Price of Natural Gas.*—*Ultra Vires.*—Where a natural gas company continues to use the streets of a city to distribute natural gas to private consumers by virtue of an accepted ordinance fixing the price of gas to consumers, it can not question the right of the city to enter into such contract. pp. 99-105.

SAME.—*Natural Gas.*—*Price to Consumers.*—*Injunction.*—A city may enjoin a natural gas company from operating under a franchise granted by such city to furnish gas to the citizens thereof, where the company is operating in violation of a provision of the franchise fixing the price of gas to consumers. pp. 105-112.

EQUITY.—*To Avoid Multiplicity of Suits.*—Where a party is entitled to legal relief, and there exists between him and a number of others entitled to relief a common interest, as against another party that can be determined by one suit, such fact affords a distinct basis for an appeal to equity. p. 110.

APPEAL AND ERROR.—*Harmless Error.*—Where the special findings set out sufficient facts to warrant a decree under the amended second paragraph of complaint, error, if any, in sustaining a demurrer to the first paragraph of complaint, was harmless. p. 113.

SAME.—*Special Finding.*—A motion for a supplemental finding does not present any question. p. 113.

SAME.—*Record.*—*Motion to Modify Decree.*—Where a motion to modify the decree is not incorporated in the bill of exceptions, or otherwise made a part of the record, the question is not before the Supreme Court. p. 113.

MUNICIPAL CORPORATIONS.—*Records of Common Council as Evidence.*—The record of the common council of a city showing the rejection of a schedule of gas rates submitted by a gas company is proper evidence of the fact of such rejection, where a certified copy of the resolution was served upon the company. pp. 113, 114.

180	97
181	601
182	43
180	97
183	91
180	97
188	196
180	97
189	356
189	632
180	97
171	654

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From Randolph Circuit Court; *A. O. Marsh*, Judge.

Suit by the city of Muncie against the Muncie Natural Gas Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

James Bingham and *Jesse Long*, for appellant.

Frank Ellis, *Rollin Warner* and *A. W. Brady*, for appellee.

GILLETT, J.—Appellee instituted this action to restrain appellant from violating a special negative covenant, in a contract between said parties, regarding the maximum price of natural gas to be furnished by appellant to the inhabitants of said city. The amended complaint was in two paragraphs, to each of which a demurrer was overruled. Appellant answered in three paragraphs, one of which was a general denial. Demurrers were sustained to the other paragraphs of answer. Upon the request of each of the parties, the court, after a trial, made a special finding of the facts, and stated its conclusions of law thereon. A decree was rendered in favor of appellee.

So far as necessary to the consideration of this case, the facts so found specially are, in substance, as follows: On the 7th day of December, 1886, appellee passed an ordinance, that was accepted by appellant on the 21st day of December, 1886, authorizing appellant to construct and maintain a system of pipes beneath the streets and alleys of said city for the purpose of furnishing and selling natural gas to its inhabitants generally. The twelfth section of the ordinance contained the following *proviso*: "Provided, that in no case shall the total cost to such consumers for private purposes of such gas at any time exceed three-fourths of the present current price of wood or coal for fuel, or of artificial gas for lighting; that the price of natural gas to private consumers for heating purposes shall be regulated by a schedule of prices submitted by the board of directors to the common council of said city at the beginning of each fiscal year, and that said company shall not, in any

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manner or for any purpose whatever, exceed the prices so submitted for that year, which schedule shall not exceed the price above stated in this section, said present price of wood being \$2.50 per cord; of anthracite coal, \$6 per ton; of soft coal, \$4 per ton, and of artificial gas, \$1.80 per thousand cubic feet." It is further found that said ordinance is still in force; that the appellant laid and still maintains the system of pipes provided for in said ordinance, and is engaged in the business of furnishing natural gas to the inhabitants of said city for heating and lighting purposes for hire; that on the 17th day of September, 1900, appellant submitted to the common council of said city a schedule, which is set out, of prices to be charged private consumers for the year beginning on the 1st day of October, 1900; that the city council investigated and considered such schedule, and, by resolution, found and declared that the prices in said schedule were excessive, and ordered and directed the appellant to submit a new schedule, which it refused to do. The findings sufficiently show that the schedule submitted provided for prices in excess of the provisions of the ordinance. It was further found by the court that since the 1st day of November, 1900, the appellant had been, and was at the time of the institution of the suit, charging the prices to consumers fixed in said schedule, under threats to discontinue the service of such consumers as refused to pay on the basis of said schedule, and that it threatens and intends to continue to charge and enforce the payment by all of its consumers of the rates set forth in said schedule. It is also found that since the 1st day of October, 1900, appellant has had more than 3,000 of said consumers in said city, who have, at great expense, fitted their residences with pipes and other fixtures to use natural gas, and that they can not procure said gas except from the appellant. It is unnecessary to set out the conclusions of law.

The first contention of appellant's counsel is that the city had no authority to enter into a contract fixing the maxi-

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mun rates to be charged the inhabitants of said city, and that therefore the contract was *ultra vires* and void. We have to deal here with a question of *ultra vires* in its true sense; that is, where the act is claimed to be *ultra vires* the corporation itself. Municipal corporations possess and can exercise such powers only as are granted by the legislature in express words, and those necessarily or fairly implied or incident to the powers expressly granted, and those essential to the declared objects and purposes of the corporation. Dillon, Mun. Corp. (4th ed.), §§89, 90; Smith, Mun. Corp., 562, and cases cited; *Pittsburgh, etc., R. Co. v. Town of Crown Point*, 146 Ind. 421, 35 L. R. A. 684; *Bogue v. Bennett*, 156 Ind. 478, 83 Am. St. 212; *Walker v. Towle*, 156 Ind. 639, 53 L. R. A. 749; *Lake County Water & Light Co. v. Walsh*, ante, 33. As said by Mr. Dillon: "The general principle of law is settled beyond controversy, that the agents, officers, or even city council of a municipal corporation, *can not bind the corporation* by any contract which is *beyond the scope of its powers*, or entirely *foreign* to the purposes of the corporation, or which (not being legislatively authorized) is against public policy. This doctrine grows out of the nature of such institutions, and rests upon reasonable and solid grounds. The inhabitants are the corporators; the officers are but the public agents of the corporation. The duties and powers of the officers or public agents of the corporation are prescribed by statute or charter, which all persons not only may know, but are bound to know. The opposite doctrine would be fraught with such danger and accompanied with such abuse that it would soon end in the ruin of municipalities, or be legislatively overthrown. These considerations vindicate both the reasonableness and necessity of the rule that the corporation is bound only when its agents or officers, by whom it can alone act, if it acts at all, keep within the limits of the chartered authority of the corporation. The history of the workings of municipal bodies has demonstrated the salu-

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tary nature of this principle, and that it is the part of true wisdom to keep the corporate wings clipped down to the lawful standard." Dillon, Mun. Corp. (4th ed.), §457. But notwithstanding this background of inhibition, we think that it may be affirmed that appellee had power to enter into the contract in question. Section 61 of the act of March 14, 1867 (Acts 1867, p. 33, §3623 Burns 1901), provides that: "The common council shall have exclusive power over the streets, highways, alleys and bridges within such city." Natural gas is a public utility that can not be obtained by the citizens of a municipality generally, except as it is conducted in pipes along the public ways of the city. The grant of exclusive power to the common council over such ways comprehends the right to permit gas companies to use the streets. If the common council may permit a natural gas company to use the streets without any conditions annexed, except such as the law attaches, it is not perceived why, as in this case, in making provision for supplying natural gas to all of the inhabitants of the city, it may not protect such inhabitants against extortion by providing that the company shall not charge in excess of certain prices for its service. The right to annex terms by way of limitation upon the authority of the grantee in such cases has been often affirmed by this court. *Western Paving, etc., Co. v. Citizens St. R. Co.*, 128 Ind. 531, 10 L. R. A. 770, 25 Am. St. 462; *City of Indianapolis v. Consumers Gas Trust Co.*, 140 Ind. 107, 27 L. R. A. 514, 49 Am. St. 183; *Cambria Iron Co. v. Union Trust Co.*, 154 Ind. 291, 48 L. R. A. 41. And see *City of Noblesville v. Noblesville Gas, etc., Co.*, 157 Ind. 162, 169.

In *City of Indianapolis v. Consumers Gas Trust Co.*, *supra*, it was said: "There was no compulsion on the part of the appellant to grant the privilege to use its streets to any particular company. It was within its discretion to give or not to give its consent, and it had the right to withhold it from all gas companies. *Citizens Gas, etc., Co. v.*

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Town of Elwood, 114 Ind. 332. It was not limited alone to the granting of this franchise, but it had the right to prescribe and impose terms and conditions. *Dillon, Mun. Corp.*, §706; *Wood, Rys.*, 2d vol., 986; *Elliott, Roads and Sts.*, 565. When these terms and conditions, proposed by the appellant, were accepted by the appellee and complied with, it became a binding contract. *Western Paving and Supply Co. v. Citizens St. R. Co.*, 128 Ind. 531."

In *Los Angeles City Water Co. v. City of Los Angeles*, 88 Fed. 720, 731, the court said: "In procuring water, or any other commodity, by purchase, one of the first things to be considered and agreed upon is the matter of price. Therefore, to hold that general power, without limitation, in a municipal corporation, to supply the city with water, does not include power to agree upon price, it seems to me would be a solecism."

The grant in this case may be said to rest upon the business or proprietary power of the city, as distinguished from its governmental or legislative power. *City of Indianapolis v. Consumers Gas Trust Co.*, *supra*; *Illinois Trust, etc., Bank v. City of Arkansas City*, 22 C. C. A. 171, 76 Fed. 271, 34 L. R. A. 518; *Safety, etc., Cable Co. v. Mayor, etc.*, 13 C. C. A. 375, 66 Fed. 140; *State, ex rel., v. Mayor, etc.*, 19 Mont. 518, 49 Pac. 15.

It is argued by counsel for appellant that if the common council may contract that natural gas rates shall not be in excess of a particular scale, it may also exercise a general supervision over those who enter into other contracts with the inhabitants of the city. Municipalities can not, of course, exercise any such paternalism as that. They can not, under existing legislation, exercise the legislative power to fix rates in any case; but we perceive no reason, in view of the condition of legislation at the time the ordinance in question was accepted, why it was not competent for appellee to annex the terms complained of to the grant of the right to use its streets. We are not required in this case

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to consider the effect of subsequent legislation. But even if there were a technical want of power upon the part of the city to enter into a contract establishing maximum rates for natural gas service, yet we do not think that appellant, while enjoying the fruits of the contract, can attack it, notwithstanding the fact that the law of *ultra vires* is more strict in its application to public than to private corporations.

Counsel for appellant seem to think that the cases in this State are somewhat out of accord with those of the United States Supreme Court, which has followed the English cases. The leading case in the United States on this subject is *Central Transportation Co. v. Pullman Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, wherein it is affirmed that partly executed contracts *ultra vires* the corporation itself are void as to both parties; that they can not be affirmed by estoppel or otherwise, and that, where the parties have so far acted upon such contracts that they can not be restored to their original situation, the court is limited to the granting of such relief, if any, as can be given independently of the contract. The declarations of the case mentioned are no broader than those found in *Board, etc., v. Lafayette, etc., R. Co.*, 50 Ind. 85, 112, wherein it is declared that a corporate "contract *ultra vires* the charter is void, and can not be made valid by any subsequent act of the corporation, because there is no residuary power to confirm it;" and that "If the act is *ultra vires* the corporation, it is void, and no one is bound."

That all power not expressly or impliedly granted to corporations is withheld, is a rule that the authorities without division apply in testing the validity of the purely executory contracts of corporations; but in so far as the defense of *ultra vires* to a contract that has been partly executed is concerned, we must look to the cases, rather than to the lexicographers, for a definition of the term *ultra vires*. Without attempting to cover the whole ground, it may be

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said that if a contract is of such character that had the corporation at once proceeded to execute it, its act would have been contrary to public policy, or expressly or impliedly prohibited by statute, or would, in any degree, disable the corporation from the performance of its statutory duties, the undertaking can not be enforced by either party. To this extent the cases, English; federal, and state, are in reasonable harmony. As illustrative of this view we cite *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 39 L. R. A. 725, 63 Am. St. 302; *State, ex rel., v. Hart*, 144 Ind. 107, 33 L. R. A. 118; *Brown v. First Nat. Bank*, 137 Ind. 655, 672, 24 L. R. A. 206; *Platter v. Board, etc.*, 103 Ind. 360; *Cullen v. Town of Carthage*, 103 Ind. 197, 53 Am. Rep. 504; *Müller v. Embree*, 88 Ind. 133; *City of Ft. Wayne v. Lehr*, 88 Ind. 62; *Driftwood Valley Turnpike Co. v. Board, etc.*, 72 Ind. 226; *Rothrock v. Carr*, 55 Ind. 334; *Burnett v. Abbott*, 51 Ind. 254; *Board, etc., v. Lafayette, etc., R. Co., supra*; *Wrought Iron Bridge Co. v. Board, etc.*, 19 Ind. App. 672. On the other hand we have a number of cases, commencing with the leading case of *State Board, etc., v. Citizens St. R. Co.*, 47 Ind. 407, 17 Am. Rep. 702, in which it is held, on the principle of equitable estoppel, that where there is a mere defect of power upon the part of the corporation to enter into the contract, a defendant, while enjoying the benefit of the contract, shall not be permitted to raise the question as to the power of the corporation. *Sturgeon v. Board, etc.*, 65 Ind. 302; *Pooch v. Lafayette Building Assn.*, 71 Ind. 357; *Bicknell v. Widner School Tp.*, 73 Ind. 501; *Louisville, etc., R. Co. v. Flanagan*, 113 Ind. 488, 3 Am. St. 674; *Wright v. Hughes*, 119 Ind. 324, 12 Am. St. 412.

The cases last cited are not seriously, if in any respect, out of accord with the Supreme Court of the United States. In *Union Pac. R. Co. v. Chicago, etc., R. Co.*, 163 U. S. 584, 16 Sup. Ct. 1173, 41 L. Ed. 265, it was pointed out that in a line of cases in that court, including *Central*

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Transportation Co. v. Pullman Palace Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, the contracts condemned as void were against public policy, and it was held that a contract as to which there was a doubt as to whether it was within the implied powers of a corporation was not to be condemned because of a remote chance that in the future it would partially disable the corporation from performing its charter duties.

The defense that a contract is *ultra vires* the corporation does not deserve the execration it has received, since in most instances there is a collateral remedy in cases where there ought to be one. Although such contracts are not necessarily illegal, the *ultra vires* doctrine has its roots, like the rule of *par delictum*, in public policy; and its chief value lies in the fact that it is a brake upon improper corporate action, more efficacious, perhaps, in its practical results than the public remedy by information. As to cases, however, of mere defects of power, we think that it should be held, in accordance with the clear weight of authority in the United States, that, while the defendant retains the benefit of the contract, the state alone can raise the question. Tested by this consideration, we hold that while the appellee continues to use the streets of the city of Muncie to distribute natural gas to private consumers, by virtue of said accepted ordinance, it can not question the right of the city to enter into such contract.

The next question is, can the city maintain an action by way of injunction to enforce the contract? It is objected that as the city is not alleged to be a consumer, the inhabitants of the city using the gas can alone sue for the invasion of their rights; and it is further objected that, in any event, injunction on behalf of the city will not lie. As a step in the solution of these questions, we shall consider who it is that brings this action. It is not the common council, for its members merely represent the municipality. The city sues, and the city is composed of the inhabitants of the

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locality. *Citizens Gas, etc., Co. v. Town of Elwood*, 114 Ind. 332; *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830; *Strosser v. City of Ft. Wayne*, 100 Ind. 443. The rule, both in England and the United States, except as changed by statute, is that it is the attorney-general, as the representative of the public, who sues for invasions of the public right, whether by way of purpresture or nuisance or because of corporate excess. *Attorney-General v. Richards*, 2 Anst. 603; *Attorney-General v. Forbes*, 2 Myl. & Cr. 123; *Mayor, etc., v. Alexandria Canal Co.*, 12 Pet. 91, 9 L. Ed. 1012; *United States v. Bell Telephone Co.*, 128 U. S. 315, 9 Sup. Ct. 90, 32 L. Ed. 450; *Coosaw Mining Co. v. South Carolina*, 144 U. S. 550, 12 Sup. Ct. 689, 36 L. Ed. 537; *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; *Columbian Athletic Club v. State, ex rel.*, 143 Ind. 98, 28 L. R. A. 727, 52 Am. St. 407; *State v. Ohio Oil Co.*, 150 Ind. 21, 47 L. R. A. 627; *Attorney-General v. Chicago, etc., R. Co.*, 35 Wis. 425, 482; *Attorney-General v. Jamaica, etc., Corp.*, 133 Mass. 361; *Attorney-General v. Delaware, etc., R. Co.*, 27 N. J. Eq. 631; *Stockton v. Central R. Co.*, 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97; *Commonwealth v. Rush*, 14 Pa. St. 186; *Kerr v. Trego*, 47 Pa. St. 292.

While the state may elect to bring an action to forfeit the franchise of a corporation created by it, because of an *ultra vires* act that tends to the prejudice of the public, yet it is not bound to do so, but may invoke the powers of its courts having general chancery jurisdiction to keep the corporation within the path marked out for it by statute. See cases last above cited. The state may well complain, where a corporation is indulging in *ultra vires* acts to the prejudice of the public, that the corporation has violated its implied contract to observe the laws of the state. *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950; *Columbian Athletic Club v. State, ex rel., supra*. This view was forcibly ex-

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pressed by McGill, chancellor, in *Stockton v. Central R. Co.*, *supra*, as follows: "Water, gas, telegraph, and similar corporations also render to the public benefits which readily suggest themselves to the mind as it contemplates their work. While the state confers special privileges upon these favorites, it at the same time exacts from them duties which also tend to the public welfare. The whole scheme of the laws of their organization is to equip and control them as instruments for the public good. Such corporations hold their powers not merely in trust for the pecuniary profit of their stockholders, but also in trust for the public weal. The impress for public good is stamped upon their very being, and it becomes a duty which, though not prescribed in express language of the law, is to be implied from the nature of every power conferred. When, therefore, it appears that such a corporation, unmindful of this plain duty, acts prejudicially to the public in order to make undue gains and profits for its stockholders, it uses its powers in a manner not contemplated by the law which confers them. The use becomes abuse, and is tantamount to excess of power."

We, of course, realize that the people of the city of Muncie are not the public at large, and that the breach of contract here complained of is not an *ultra vires* act. But the question is whether the analogy is not sufficiently great to justify courts of chancery, whose peculiar boast is the adaptability of their remedies, to extend relief where an adequate remedy is wanting, in granting relief in cases of this kind. It was declared by Lord Chancellor Cottenham, in *Taylor v. Salmon*, 4 Myl. & Cr. 134, 141, that it is the duty of a court of equity "to adapt its practice and course of proceeding as far as possible to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not, from too strict an ad-

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herence to forms and rules established under very different circumstances, decline to administer justice, and to enforce rights for which there is no other remedy."

The people of the city of Muncie—to borrow somewhat from the thought of one of our cases—are the public of that locality, and it appears that the appellant is doing acts to the prejudice of the inhabitants of the city, while exercising a public function by virtue of a contract that has admitted it to the streets of the municipality. The analogy is so close between the case of the state suing to enjoin an *ultra vires* act by one of its corporations and the case in hand that we think it ought to be held that the city may maintain an action to restrain appellant, if the facts otherwise warrant equitable intervention. But this case is in principle within existing adjudications as to the power of the municipality to sue on behalf of its inhabitants. In *Mayor, etc., v. Bolt*, 5 Ves. Jr. 129, the court of chancery granted an injunction, upon the application of the city of London, to restrain acts that amounted to a nuisance by endangering the lives of the inhabitants.

The case of *Trustees, etc., v. Cowen*, 4 Paige 510, 27 Am. Dec. 80, was a suit to enjoin the unauthorized erection of a structure upon grounds dedicated to the public of a municipality. In disposing of the case, Chancellor Walworth, after stating that he did not feel disposed to go the length of holding that the legal title of the land was vested in the village, said: "I can see no valid objection to considering the corporation as the proper representative of the equitable rights of the inhabitants of the village to the use of the public square, so as to authorize the filing of a bill by the corporation, in this court, to protect those equitable rights against the erection of this nuisance."

Municipality of the Town of Guelph v. Canada Co., 4 Grant Ch. (Upper Can.) 632, was an action to restrain the defendant therein from selling certain property within the town that it was claimed had been dedicated by the defend-

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ant in laying out the lands of the municipality. It was objected that the attorney-general was not a party, but the court said: "The legislature has entrusted the plaintiffs with extensive powers in relation to the public property of the town of Guelph, and has at the same time devolved upon them the duty of protecting the rights of the public from infringement. Now it can not be denied that the inhabitants of Guelph have a peculiar interest in the market place. The infringement complained of would obviously inflict a special injury on the inhabitants of Guelph. A private individual sustaining special damage is allowed to file a bill of this sort, and it is difficult to understand why this municipality should not have the same right."

In *Inhabitants, etc., v. Easton, etc., R. Co.*, 24 N. J. Eq. 217, the court cited approvingly the case of *Trustees, etc., v. Cowen, supra*, on the proposition as to the right to an injunction, and pointed out the fact that a township sustains a special injury by the destruction of its highways, beyond that of the public in general, because of its burden of repair. See, also, as to the right of the city to sue, *State, ex rel., v. Bridgeton, etc., Traction Co.*, 62 N. J. L. 592, 43 Atl. 715, 45 L. R. A. 837; *Florida, etc., R. Co. v. State, ex rel.*, 31 Fla. 482, 13 South. 103, 34 Am. St. 30, 20 L. R. A. 419; *Williams v. Smith*, 22 Wis. 594.

If we appeal to the analogous right of the state to restrain nuisances, or to prevent its corporations from committing *ultra vires* acts, it may be affirmed that it is not necessary to show that the city has itself sustained damage when it sues for the benefit of its inhabitants, but that it is enough to show that the act tends to injure the public of the municipality. *Grey v. Greenville, etc., R. Co.*, 59 N. J. Eq. 372, 46 Atl. 638; *Attorney-General v. Shewsbury Bridge Co.*, L. R. 21 Ch. Div. 752. And see *Eel River R. Co. v. State, ex rel.*, 155 Ind. 433. In *Attorney-General v. Ely, etc., R. Co.*, 4 L. R. Ch. 194, it was said: "The question is, whether what has been done has been done in accordance

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with the law; if not, the attorney-general strictly represents the whole of the public in saying that the law shall be observed."

We really need no analogies, however, to uphold the right of appellee to maintain this suit. The city, as a corporate entity, represents all of its inhabitants. The streets over which it has exclusive power are being used by appellant under a contract with the city that appellant has broken. This would entitle the city to at least nominal damages at law; and its right to restrain the further breach of the contract, which amounts to a negative specific enforcement of the contract, can be affirmed on the ground that it will avoid a multiplicity of actions. This is not an independent source or occasion of jurisdiction, but, as laid down by Professor Pomeroy, where a party is entitled to even legal relief, and there exists between him and a number of others entitled to relief a common interest, relation, or question, as against another party, that can be determined by one suit, such facts afford a distinct basis for an appeal to equity. Pomeroy, *Eq. Jurisp.* (2d ed.), §243 *et seq.* In such cases it is not necessary that the party suing should himself be threatened by, or compelled to resort to, numerous actions to vindicate his right, because considerations of governmental policy enter into the question. As applied to this case, it is a matter of public expediency that by one suit rights shall be established for the time that the injunction has to run, instead of hundreds of the inhabitants of the city being each compelled to sue to vindicate his right, or otherwise to submit to a small, but annoying, injustice. *Attorney-General v. Chicago, etc., R. Co.*, 35 Wis. 425.

But the appellee had a right to appeal to equity on another ground. The city was a party to the contract, and it complains of the breach of a negative covenant. This is a case, so far as the covenant is concerned, for a negative specific performance by means of an injunction. A court

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of equity, where there is a basis for the assertion of its jurisdiction, will not suffer men to depart from their agreements at pleasure, leaving the party with whom they have contracted to the mere chance of damages which a jury may give. *Lumley v. Wagner*, 1 DeG., M. & G. 604, 619; *DeMattos v. Gibson*, 4 DeG. & J. 282. A well known writer on injunctions, after stating that there may be cases where a court of equity would refuse to interfere where it is clear that the damages for a breach would be inappreciable, says: "A covenantee has the right to have the actual enjoyment of property *modo et forma* as stipulated for by him. It is no answer to say that the act complained of will inflict no injury on the plaintiff, or will be even beneficial to him. It is for the plaintiff to judge whether the agreement shall be preserved as far as he is concerned, or whether he shall permit it to be violated. It is not necessary that he should show that any damage has been done. It being established that the acts of the defendant are a violation of the contract entered into by him, the court will protect the plaintiff in the enjoyment of the right which he has purchased." Kerr, *Injunctions*, *532.

Appellant's counsel contend that the contract in question was made for the exclusive benefit of third persons, and that, therefore, the city is not the real party in interest within §251 Burns 1901. Assuming the correctness of this position, it does not follow that the city may not sue, for the next section of the statute provides: "An executor, administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another." §252 Burns 1901. We think it may be properly said, in view of the contract, that, if the city can not sue on its own account, it appears that it is the

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trustee of an express trust within the meaning of the statute last mentioned. The language of the covenant is not as clear as it might be, but, so far as objection to it is pointed out, we think that it is capable of construction. The first point to ascertain is what the parties themselves meant and understood, but courts can not adopt a construction of a legal instrument which would do violence to the rules of language or to the rules of law. 2 Parsons, Contracts (8th ed.), 494.

It is unnecessary to determine whether section twelve of the ordinance gave the city any power to regulate charges to private consumers within the maximum scale of charges; but it is clear, from the language twice repeated, that there was to be a maximum scale. For heating purposes, the price of gas was not to exceed "three-fourths of the present current price of wood or coal for fuel," and the cost of natural gas for lighting was not to exceed a like ratio to the cost of artificial gas. Then follows the provision as to the submission of the schedule of charges for heating purposes; next, the provision that the "schedule shall not exceed the price above stated," and, finally, the then current prices of wood, coal, and artificial gas are fixed. The parties sought a standard and it ought to be the endeavor of the court, so far as possible, to give to that standard the element of certainty, and not to import elements of uncertainty into it that the parties did not see fit to mention. If there be any question concerning the correctness of this construction, the doubt must be solved in favor of the city, because public contracts should be construed, not *contra proferentem*, but liberally in favor of the public. *Indianapolis, etc., St. R. Co. v. Citizens St. R. Co.*, 127 Ind. 369, 8 L. R. A. 539; *Western Paving, etc., Co. v. Citizens St. R. Co.*, 128 Ind. 525, 10 L. R. A. 770, 25 Am. St. 462; *Cambria Iron Co. v. Union Trust Co.*, 154 Ind. 291, 48 L. R. A. 41; *Slidell v. Grandjean*, 111 U. S. 412, 4 Sup. Ct. 475, 28 L. Ed. 321; *Joy v. St. Louis*, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843.

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Coosaw Mining Co. v. South Carolina, 144 U. S. 550, 12 Sup. Ct. 689, 36 L. Ed. 537; Beach, Contracts, §726. This principle of construction, it was said, as applied to public grants, in the Slidell case, and also in the Coosaw Mining Company case, "Is a wise one, as it serves to defeat any purpose, concealed by the skilful use of terms, to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies."

The views that we have expressed in this opinion dispose of all questions concerning the rulings on the pleadings, except as to the sufficiency of the first paragraph of complaint; but as the special findings set out sufficient facts to warrant a decree under the amended second paragraph of complaint, the error, if any, in sustaining a demurrer to the first paragraph of complaint was harmless.

The court did not err in overruling the motion for a *venire de novo*, so called. The finding complained of stated matters of ultimate fact, and did not state the whole issue, as counsel assume. The motion for a supplemental finding does not present any question. *Sharp v. Malia*, 124 Ind. 407; *Bunch v. Hart*, 138 Ind. 1; Elliott, App. Pro., §757. We do not find that the motion to modify the decree was incorporated in a bill of exceptions, or that it was otherwise made a part of the record, and therefore the question is not before us. *Adams v. La Rose*, 75 Ind. 471; *Forsythe v. Kreuter*, 100 Ind. 27; *People's Sav., etc., Assn. v. Spears*, 115 Ind. 297; §662 Burns 1901.

We can not disturb the finding on the evidence. There was a vast quantity of testimony offered as to the comparative values of the fuels and lights in question, and we can not say that the court erred in its conclusions of fact concerning the same.

The record of the common council showing its rejection of the schedule submitted by appellant was proper substantive evidence of the fact of such rejection, as a certified copy of the resolution was served upon appellant. After the lat-

ter had submitted its schedule of rates for the then ensuing year, it was incumbent upon appellee to reject it before it could sue; and we can not assume that the learned judge who tried this case gave credence to any of the interwoven declarations of fact not relevant to the question in issue.

Complaint is made by appellant's counsel as to the action of the trial court in the admission and exclusion of certain items of evidence not already directly or impliedly ruled on in the course of this opinion. For the most part these objections are insufficiently briefed. Elliott, App. Pro., §445; *Harrison v. Hedges*, 60 Ind. 266; *Bray v. Franklin Life Ins. Co.*, 68 Ind. 6; *Northwestern Mut. Life Ins. Co. v. Hazelett*, 105 Ind. 212, 55 Am. Rep. 192. The other objections can be disposed of on practice grounds, relative to the condition of the transcript, or for the reason that the objections are not well taken.

Judgment affirmed.

BOSEKER, EXECUTRIX, ET AL. v. CHAMBERLAIN.

[No. 19,988. Filed February 19, 1908.]

PLEADING.—Complaint by Assignee.—Defect of Parties.—Demurrer.—If the facts alleged in a complaint by the assignee of a claim arising out of a contract show that the assignor is dead, and that there is no personal representative within the State, the complaint is sufficient to withstand a demurrer for defect of parties. *pp. 115, 116.*

SAME.—Complaint.—Demurrer for Defect of Parties.—A demurrer for want of facts presents no question as to defect of parties. A demurrer for defect of parties must specifically point out the defect complained of, and give the name or names of the parties who should be joined. *p. 117.*

SAME.—Abatement.—Parties.—A plea in abatement for non-joinder of parties defendant which fails to show that the persons not joined as defendants are living and subject to process of the court, thus giving a better writ, is bad. *p. 117.*

PARTIES.—Defect of.—Waiver.—The failure to raise the question of non-joinder of parties by demurrer in proper form, or by plea in abatement, is a waiver of such objection. *p. 118.*

EVIDENCE.—Assignment of Claim.—Admission Without Proof of Execution.—Notice.—The written assignment of a claim sued on is admissible in evidence without proof of its execution, where §478 Burns 1901,

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providing the manner in which writings material to an action may be rendered competent, has been complied with. p. 118.

APPEAL.—*Rules of Supreme Court.*—*Briefs.*—That the evidence was not sufficient to sustain the finding of the trial court may not be considered on appeal, where clause 5 of rule 22 of the Supreme Court, requiring the statement in the brief to contain a condensed recital of the evidence, has not been complied with. p. 118.

From Superior Court of Allen County; *J. H. Aiken*, Judge.

Action by Norman H. Chamberlain against Cornelia Boseker, executrix of the estate of Christian Boseker, deceased, and another. From a judgment for plaintiff, defendants appeal. Transferred from Appellate Court, under §1837u Burns 1901. *Affirmed.*

W. H. Shambaugh, J. M. Barrett and S. L. Morris, for appellants.

Robert Lowery, for appellee.

MONKS, J.—Appellee, as assignee of Cassius M. Ensminger, brought this action against Christian Boseker and William Moellering to recover for work and labor performed and for materials and money furnished by said Ensminger at the request of said Boseker and Moellering. Said Boseker died intestate before the trial of said cause, and his executrix was substituted as a defendant. A trial of said cause by the court resulted in a finding and judgment in favor of appellee.

The errors assigned and not waived call in question the action of the court in overruling the demurrer of each appellant to each paragraph of the complaint, appellants' motion for a new trial, and appellants' motion in arrest of judgment.

The grounds of demurrer to each paragraph of the complaint were that there was a defect of parties defendant, in this: "That Cassius M. Ensminger is not made a party defendant to either paragraph of said action; (2) that the administrator of the estate of Cassius M. Ensminger, alleged to be deceased, is not made a defendant to either

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paragraph of the complaint." It is alleged in the first paragraph that Ensminger assigned the account sued upon to appellee, "by an assignment in writing, a copy of which is filed herewith, and marked exhibit B;" that said Ensminger afterward died; that at the time of said assignment "he was a resident and citizen of the state of Missouri, and he was not, at the time of said assignment, or at the time of his death, or at any time, a citizen or resident of the State of Indiana, and that there has never been an appointment of an administrator or executor for him or his estate." The allegations in the other paragraphs of the complaint in regard to the residence and death of said Ensminger, and there being no administrator or executor of his estate, are substantially the same as in the first paragraph.

Section 277 Burns 1901, §276 R. S. 1881 and Horner 1901, provides that: "When an action is brought by the assignee of a claim arising out of contract, and not assigned by indorsement in writing, the assignor shall be made a defendant, to answer as to the assignment or his interest in the subject of the action." Ensminger, if he had been living when this action was commenced, would have been a necessary party under said section. It is evident that if he was dead his administrator or executor, if any, would have been a necessary party under said section. *Bray v. Black*, 57 Ind. 417, 419; *St. John v. Hardwick*, 11 Ind. 251, 252.

If the assignor was dead, and there was no executor or administrator of his estate when this action was commenced, as alleged in each paragraph of the complaint,—all of which must be taken as true in passing upon the demurrer—it can not be said that there was a defect of parties defendant in not making the assignor or the executor or administrator of his estate a party defendant, for the reason that the assignor was dead, and there was no executor or administrator of his estate within the jurisdiction of the court. It has been held by this court that if the facts alleged show that the assignor is dead, and that there is no

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personal representative, the same are sufficient to withstand a demurrer for the defect of parties, required by §277, *supra*. *Bray v. Black, supra*; *St. John v. Hardwick, supra*.

The rule is that a demurrer for defect of parties must specifically point out the defect complained of, and give the name or names of the parties who should be joined, stating whether as plaintiffs or defendants. *State, ex rel., v. McClelland*, 138 Ind. 395, 398, 399; *Cox v. Bird*, 65 Ind. 277, 280, 281; *Durham v. Bischof*, 47 Ind. 211, 213; *Vansickle v. Erdelmeyer*, 36 Ind. 262, 263; *Works' Prac.* (3d ed.), §483. This is because the demurrer for such cause performs the same office that a plea in abatement performs when the defect of parties does not appear upon the face of the complaint.

A plea in abatement for non-joinder of parties defendant, which fails to show that the persons not joined as defendants are living and subject to the process of the court, thus giving a better writ, is bad. *Ford v. Garner*, 5 Ind. 297, 298; *Levi v. Haverstick*, 51 Ind. 236; *Gilbert v. Allen*, 57 Ind. 524; *Hess v. Lowrey*, 122 Ind. 225, 228, 7 L. R. A. 90, 17 Am. St. 355; *Ferguson v. State*, 90 Ind. 38; *Bledsoe v. Irvin*, 35 Ind. 293, 294; *Alexander v. Collins*, 2 Ind. App. 176, 179; *Carico v. Moore*, 4 Ind. App. 20, 22, 23; 15 Ency. Pl. & Pr., 576.

It follows, if the facts alleged in the complaint show that the person not joined in a case, like the one before us, is dead, and no executor or administrator of his estate has been appointed in this State, that the same is sufficient to withstand a demurrer, in proper form, for defect of parties defendant.

It is clear, even if each paragraph of the complaint was not sufficient to withstand a demurrer, in proper form, for defect of parties, on account of the non-joinder of the administrator of the estate of Ensminger as a defendant, that the second ground of the demurrer filed in this case did not present that question, because the name of such administrator was not given.

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A demurrer for want of facts presents no question concerning a defect of parties plaintiff or defendant. *Carskadon v. Pine*, 154 Ind. 410, and authorities cited; *Strong v. Downing*, 34 Ind. 300, 301.

The failure to raise the question of non-joinder of parties by demurrer in proper form, or by plea in abatement, is a waiver of such objection. §346 Burns 1901, §343 R. S. 1881 and Horner 1901; *State, ex rel., v. McClelland*, 138 Ind. 395, 399; *Kelley v. Love*, 35 Ind. 106; *Leedy v. Nash*, 67 Ind. 311, 317.

The rules governing actions by heirs to collect debts due their ancestors, declared in *Jewell v. Gaylor*, 157 Ind. 188, *Indianapolis, etc., R. Co. v. Price*, 153 Ind. 31, and cases of that class, have no application to this case.

During the progress of the trial, counsel for appellee, over the objection of appellants, read in evidence the written assignment of the claim sued upon, executed by Cassius M. Ensminger. The evidence shows, however, that appellee had, before the trial, fully complied with all the requirements of §486 Burns 1901, §478 R. S. 1881 and Horner 1901. Said written assignment was therefore properly read in evidence, under said section, without proof of its execution, although it was not the foundation of the action.

It is insisted by appellant that the evidence was not sufficient to sustain the finding of the court. Appellants are not in a position to ask a decision of this question, on account of their failure to comply with clause five of rule twenty-two of this court, which requires that the statement in the brief "shall contain a condensed recital of the evidence in narrative form, so as to present the substance clearly and concisely." *Indiana, etc., R. Co. v. Ditto*, 158 Ind. 669.

We have, however, read the evidence, and find that there is evidence which sustains all the allegations in the complaint necessary to a recovery in this action.

Judgment affirmed.

TEAL ET AL. v. RICHARDSON.

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[No. 19,702. Filed February 19, 1903.]

WILLS.—*Construction.*—*Rule in Shelley's Case.*—A devise of real estate to testator's daughter "to have and to hold during her natural life, with power to my said daughter to sell and convey the same in fee simple in case it becomes necessary so to do, and the remainder after her death to the heirs of her body in fee simple," falls within the rule in Shelley's Case, and, under §3878 Burns 1901, abolishing estates tail, vests in the daughter a fee simple estate. *pp. 119-123.*

SAME.—*Construction.*—Where real estate is devised in fee simple to one, coupled with a devise over if such devisee should die without issue living at the time of his death, the words refer to a death without issue during the lifetime of the testator, and the primary devisee surviving the testator takes an absolute estate. *p. 123.*

From Steuben Circuit Court; *P. V. Hoffman*, Special Judge.

Suit by Elizabeth M. Richardson against Asbury Teal and others to quiet title. From a judgment for plaintiff, defendants appeal. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

S. A. Powers and *A. C. Wood*, for appellants.

J. A. Woodhull and *J. G. Yeagley*, for appellee.

MONKS, J.—Eli M. Teal died testate in 1899, the owner in fee simple of the real estate in controversy in this case. He left no descendants surviving, except appellee, his daughter, a widow, who had no children at the time the will was made or at his death. Said testator, by his will, which was duly admitted to probate in Steuben county, disposed of all his property, real and personal. The part of his will disposing of his real estate reads as follows: "Item 4. I give and devise to my daughter, Elizabeth Richardson, all my real estate which I may own or in which I have any interest at my decease, to have and to hold during her natural life, with power to my said daughter to sell and

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convey the same in fee simple, in case it becomes necessary so to do, and the remainder after her death to the heir or heirs of her body in fee simple. If my said daughter should die without issue living at the time of her death, then it is my will," etc. Here follows a devise over of all his estate to appellants, the children and grandchildren of the testator's brothers. If said will gave said real estate to the appellee in fee simple, this case must be affirmed; if for life only, it must be reversed.

It is insisted by appellee that said devise to her of the real estate in controversy falls within the rule in Shelley's Case, and that she therefore took the same in fee simple. Said rule is: "That when a freehold is devised to the ancestor for life and by the same instrument it is limited either mediately or immediately to his heirs or the heirs of his body the word 'heirs' is a word of limitation and not of purchase, and the ancestor takes the same in fee or in tail, as the case may be." *Perkins v. McConnell*, 136 Ind. 384, and cases cited; *Allen v. Craft*, 109 Ind. 476, 58 Am. Rep. 425, and cases cited; *Nelson v. Davis*, 35 Ind. 474, 478; 2 Thomas, Coke's Institutes, 117-124, note P, and note IV, pp. 534-540; Blackstone's Comm., *242; 4 Kent's Comm., 214 *et seq.*; Washburn, Real Property (6th ed.), §§1601-1604, 1607-1613; 2 Fearne, Remainders, Chap. 12, §§393-502, pp. 206-248. By our statute (§3378 Burns 1901, §2958 R. S. 1881 and Horner 1901), estates tail are abolished, and what would be at common law an estate tail, is in this State a fee simple. *Waters v. Lyon*, 11 Ind. 170, 175.

It is firmly settled that the rule in Shelley's Case is a rule of property and not a rule of construction in this State. *Allen v. Craft*, *supra*; *Shimer v. Mann*, 99 Ind. 190-192, 50 Am. Rep. 82, and cases cited; *Waters v. Lyon*, *supra*; 22 Am. & Eng. Ency. Law, 495-511, and notes. The words "heirs" or "heirs of the body," in their primary and strict legal sense, are words of limitation, and not of purchase.

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Nelson v. Davis, supra; Shimer v. Mann, supra, and authorities cited; *Allen v. Craft, supra; Schoonmaker v. Sheely*, 3 Denio 485. It is true, as stated by appellants, that the cardinal rule in the construction of wills is that the intention of the testator must control; but it is also true that when words are used that have a settled legal meaning, full effect must be given to them.

It is said in 4 Kent's Comm., *229: "All the modern cases contain one uniform language, and declare that the words, *heirs of the body*, whether in deeds or wills, are construed as words of limitation, unless it clearly and unequivocally appears that they were used to designate certain individuals answering the description of heirs at the death of the party."

In Washburn, Real Property (6th ed.), §1613, it is said: "The rule is, as a rule of common law, so imperative, that though there be an express declaration that the ancestor shall only have a life estate, it will not defeat its union with the subsequent limitation to his heirs. So, though the limitation be accompanied by a declaration to the effect that the heirs shall take as purchasers, or is made to the heirs of the first taker and their heirs, or where the estate is to A for life, and after his death, to the heirs of his body, to share as tenants in common, or to be equally divided between them, it comes within the rule."

It was said by this court in *Shimer v. Mann, supra*, at page 193: "The word 'heirs' written in a deed or will is one of great power, and its force is not impaired by the mere use of negative or restraining words. Fearne expresses this doctrine in very strong words, for he declares that 'the most positive direction' will not defeat the operation of the rule in Shelley's Case. 2 Fearne, Remainders, §453. * * * While it is true that the word 'heirs' may be explained to mean children, it is also true that this meaning can not be assigned to the word unless it clearly appears that it was employed by the testator in that sense. The

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courts have used very strong language upon this subject. *
* * 'Technical words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense.' *Doe v. Gallini*, 5 Barn. & Ad. 621. Redfield says: 'Conjecture, doubt, or even equilibrium of apparent intention will not suffice.' 2 Redfield, Wills (2d ed.), 67; *Guthrie's Appeal*, 37 Pa. St. 9; *Jordan v. Adams*, 9 C. B. (N. S.) 483; *Poole v. Poole*, 3 B. & P. 620; *Doebler's Appeal*, 64 Pa. St. 9."

As was said by Judge Sharswood, in *Ingersoll's Appeal*, 86 Pa. St. 240, 245: "Nothing certainly is better settled than that the intention of a testator, if not contrary to law, shall be carried out in the disposition he may make of his property after death. There are many things which he can not do, however clearly he may intend it. He can not create a fee and clog the power of alienation or relieve it from liability for debts. He can not create a perpetuity by an executory devise after an indefinite failure of issue or at any other future period, which may not be until after a life or lives in being and twenty-one years." In *Doebler's Appeal*, 64 Pa. St. 9, 15, the same judge said: "While the intention of the testator, if consistent with law, is undoubtedly to be the polar star, yet we are bound to take as our guides those general rules or canons of interpretation which have been adopted and followed by those who have gone before us. It becomes no man and no court to be wise above that which is written. Security of titles require that no mere arbitrary discretion should be exercised in conjecturing what words the testator would have used, or what form of disposition he would have adopted had he been truly advised as to the legal effect of the words actually employed. That would be to make a will for him instead of construing that which he had made."

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It follows that there is no escape from the force of the rule in Shelley's Case when the word "heirs" is used in its strict legal sense as a word of limitation. There is no conflict between this rule and that declaring that the intention of the testator must control, for the reason that when the word "heirs" is used as a word of limitation, it conclusively expresses the intention of the testator to devise an estate in fee simple. *Allen v. Craft*, 109 Ind. 476, 486-488, 58 Am. Rep. 425. As there is nothing in said will which clearly and unequivocally shows that the word "heirs" was not used in its strict legal sense, it must be held that the devise falls within the rule in Shelley's Case, and that appellee took said real estate in fee simple. It is settled law in this State that when real estate is devised in fee simple to one, coupled with a devise over, if such devisee should die without issue living at the time of his death, the words refer to a death without issue during the lifetime of the testator, and the primary devisee surviving the testator takes an absolute estate. *Morgan v. Robbins*, 152 Ind. 362, 363, and cases cited; *Aspy v. Lewis*, 152 Ind. 493, 496-499, and cases cited. It is clear, under these rules, that appellee took said real estate in fee simple on the death of the testator.

Judgment affirmed.

TIMMONDS v. TWOMEY ET AL.

[No. 19,999. Filed February 19, 1903.]

APPEAL AND ERROR.—*Evidence.*—*Record.*—Where appellant, who on June 23 was given sixty days to file his general bill of exceptions, filed the reporter's transcript of the evidence which was not certified by the judge until September 25, and was refiled October 20, the evidence is not properly in the record. *p. 124.*

SAME.—*Instructions.*—*Record.*—*Evidence.*—Where a special bill of exceptions containing instructions given and refused does not show that it contained all of the instructions given, and the evidence is not in the record, the instructions can not be considered. *p. 124.*

SAME.—*Trial.*—*Misconduct of Jury.*—*New Trial.*—*Record.*—Alleged misconduct of the jury brought to the attention of the trial court

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by affidavits filed in support of a motion for a new trial can not be considered on appeal where the affidavits are not made a part of the record. *p. 124.*

From Floyd Circuit Court; *W. C. Utz*, Judge.

Action by Richard H. Timmonds against Walter L. Twomey and wife. From a judgment in favor of defendants, plaintiff appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

L. A. Douglass and *H. W. Phipps*, for appellant.

F. M. Mayfield and *M. Z. Stannard*, for appellees.

GILLET, J.—This action was instituted by appellant against appellees. A trial resulted in a verdict and judgment for appellees. On June 23, 1900, appellant was given sixty days in which to prepare and file his general bill of exceptions. On August 20, 1900, the reporter's transcript of the evidence was filed in the office of the clerk of the Floyd Circuit Court. The transcript was certified by the judge of said court September 25, 1900, and was refiled in the office of said clerk, October 20, 1900. The evidence is not in the record. *Adams v. State*, 156 Ind. 596. There was a special bill of exceptions filed containing instructions given and refused, but it is not shown that the instructions given were all of the instructions that the court gave. In view of this fact, and that the evidence is not before us, we can not consider the questions argued by appellant's counsel with reference to the instructions.

Complaint is made that the jury was guilty of misconduct. The matter of the alleged misconduct of the jury was brought to the attention of the trial court by affidavits filed in support of the motion for a new trial, but these affidavits were not made a part of the record. No further question remains.

Judgment affirmed.

THE INDIANAPOLIS STREET RAILWAY COMPANY
v. WHITAKER.

[No. 20,003. Filed February 20, 1903.]

STREET RAILROADS.—*Injury to Passenger While Attempting to Alight.*—*Instruction.*—Where the only negligence charged in an action against a street railway company was the sudden starting of the car while the plaintiff was on the running-board in the act of getting off, an instruction that plaintiff after she left the car assumed all risk in stepping or walking over the street in the condition it was then in was properly refused. *pp. 126, 127.*

EVIDENCE.—*Res Gestae.*—*Declarations.*—Utterances and exclamations of participants, or of persons acting in concert, made immediately before or after, or in the execution of an act, which go to illustrate the character of the act, are usually admissible in evidence on the ground that they are a part of the *res gestae*; but the utterance or declaration of a person who sustains no relation to the transaction is not admissible. *pp. 127, 128.*

SAME.—*Street Railway Accident.*—*Res Gestae.*—*Declaration of Passenger.*—In an action against a street railway company for injuries sustained by a passenger and alleged to have been caused by the sudden starting of the car, it was error to permit another passenger who saw the accident to testify that she stated to the conductor at the time that if he had stopped the car the accident would not have happened. *pp. 127-129.*

From Morgan Circuit Court; *M. H. Parks*, Judge.

Action by Katie Whitaker against the Indianapolis Street Railway Company. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under §1387u Burns 1901. *Reversed.*

W. H. Latta, F. Winter and C. Winter, for appellant.

J. J. Rochford, J. M. Wall, C. G. Renner and J. C. McNutt, for appellee.

HADLEY, C. J.—This action was brought by appellee to recover damages for personal injuries alleged to have been received by the negligent act of appellant in starting its car while appellee, a passenger, was in the act of alighting therefrom. The case went to the jury on the general denial.

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Verdict and judgment for appellee for \$800. The error relied upon for a reversal is the overruling of appellant's motion for a new trial.

1. At the proper time appellant tendered and requested the court to give to the jury twenty-four instructions. The court refused to give the fourth, seventh, eighth, eleventh, twenty-second, and twenty-fourth, and gave all the others as asked, except the twenty-third, which was given as modified. The action of the court in rejecting these instructions is the first question presented. The twenty-second was not germane. The only negligence complained of is the violent and sudden starting of the car, without warning, while the plaintiff was on the running-board, in the act of getting off, whereby she was thrown to the ground and injured. The twenty-second proposition was, in effect, that the plaintiff, so far as this case is concerned, assumed all the risk of stepping or walking over the street in the condition it was then in. The conduct of the plaintiff, and her relation to the peril in walking over the street after she had left the car, had nothing to do with the case, and the instruction requested on that point was properly refused. The other requests refused, while generally containing true expressions of the law, were all given, in substance, by the court, in numbers submitted to the jury of its own motion. The modified instruction is as follows: "If you further find from the evidence that the negligence of the plaintiff, in any respect, caused or contributed to her injury (in such a way as to be the proximate cause thereof), you must find for the defendant, even though the defendant also be negligent as charged." The modification consisted of inserting the words within the parenthesis. The modifying words are subject to at least a verbal, if not a more serious objection; but, as the cause will have to be reversed for another reason, we deem it unprofitable to discuss it.

Eleven of the instructions given by the court are also challenged. They consist in the definition of negligence,

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contributory negligence, and proximate cause; that the action, to be maintainable, must rest upon a violated duty; the constant duty of care for one's safety, but the right of plaintiff to assume that the defendant would do its duty in observing care in extending to her time and opportunity safely to alight from the car; what acts would not constitute contributory negligence; a carrier of passengers, while not an insurer of safety, is required to exercise the highest degree of care to secure safety; it is the duty of a street car company to stop and hold its car stationary until the passenger has time to alight; and what is meant by the "burden of proof." The court gave to the jury, in all, thirty-five instructions, fully, clearly, and correctly covering every phase of the case. We have carefully examined the charge in its entirety, in connection with the propositions refused, and have become convinced that the charge was not only full, and free from error, but, in all its terms, quite as favorable to the defendant as it had the right to ask. On account of the number brought in question, and in the absence of special assault upon any, we have not felt justified in extending this opinion by setting them forth in detail.

2. The record shows that Sarah Johnson, a witness for the plaintiff, in her direct examination, having described the falling of the plaintiff from the car to the street, and witness' assistance in helping plaintiff up, was asked and permitted to answer, over the objection of the defendant, the following question: "Was anything said there by you to the conductor while she [meaning plaintiff] was on the ground, about them stopping the car, or Mrs. Whitaker's falling? A. Yes, sir; I said when she first fell, 'if you had stopped and let her off, this would not have occurred.'" The conductor made no reply, as is shown by what immediately followed. Utterances and exclamations of participants, or of persons acting in concert, made immediately before or after or in the execution of an act, which go to illustrate the character and quality of the act, are

usually admissible on the ground that they are a part of the *res gestae*, and provable like any other fact that elucidates the issue. The rule, however, seems to be exclusive, that to render the expression or declaration of another admissible, the party making it must have been so related to the occurrence as to make his declaration a part of it. The test seems to be that to render the utterance, or declaration of another admissible, it must flow from one of the actors, or from one sustaining some relation to the transaction, and be so intimately connected with the litigated act as to be the act speaking of itself through the witness, and not the witness speaking the words of another, employed concerning the act. *Gillett, Ind. & Collat. Ev.*, §290; *Wilkins v. Ferrell*, 10 Tex. Civ. App. 231, 30 S. W. 450; *State v. Riley*, 42 La. Ann. 995, 8 South. 469; *Kaelin v. Commonwealth*, 84 Ky. 354, 366, 1 S. W. 594; *Senn v. Southern R. Co.*, 108 Mo. 142, 18 S. W. 1007; *Kirkpatrick v. Briggs*, 78 Hun 518, 29 N. Y. Supp. 532.

In the last case cited the plaintiff fell through an open trap-door in the sidewalk. On the trial for negligent injury, the plaintiff was permitted to testify that after he was helped out of the hole by the defendant's servant, who had left the trap-door open, a man came along and remarked to the defendant's servant: "That is a very careless way to leave that, young fellow." Held to constitute reversible error.

In *Senn's* case the father did not see the accident, and reached the place within two or three minutes after its occurrence. He was asked on the trial what he said to the driver, and answered: "I said to him, 'It was your careless driving.'" The remark was held to be no part of the *res gestae*, and inadmissible.

The witness Johnson was wholly disconnected with the occurrence. She had testified to having been but a few feet away, in the act of crossing the street, when the car arrived at the crossing and stopped, and to having seen the plaintiff

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leave her seat and proceed to alight from the car, and, while in the act of getting out, the car moved off with a sudden jerk, throwing the plaintiff to the ground. As to all that happened at the time of the plaintiff's injury the witness was a mere onlooker, and there appears no more reason why her utterance should be received as original evidence than the comments of other bystanders. What the witness said at the time of the occurrence, if competent at all as direct evidence, might have been just as properly testified to by another who heard the words. Because the witness herself had made the remark added nothing to its competency. It is clear that it was error in the court to admit the evidence, and likewise error to overrule the motion to strike it out.

We are unable to say that the evidence did the defendant no harm. The most prominent question in controversy was whether the car stopped and remained stationary until after the plaintiff had alighted, and that she fell from stumbling in the street after she had left the car, or whether, while in the act of descending from the running-board, the car's sudden and violent movement forward threw her to the ground. There was a greater number of witnesses who testified for the defendant in this contention than for the plaintiff, and it is by no means clear that the observations of the witness, expressed within a minute of the accident, did not result in the jury giving more weight to her testimony than they would otherwise have found it entitled to.

Judgment reversed, with instructions to grant appellant a new trial.

WILLIAMS v. CHAPMAN.

[No. 20,007. Filed February 24, 1903.]

TRIAL. — *Witnesses.* — *Evidence.* — *Objection.* — *Appeal and Error.* — The ruling of the court in sustaining an objection to a question to a witness is not reviewable on appeal, where no statement was made as to what the witness would testify to in answer to the question. *pp. 130, 131.*

APPEAL AND ERROR. — *Instructions.* — *Error.* — In order to make instructions a part of the record by special exceptions written on the margin of each, under §542 Burns 1901, they must be filed after the exceptions are reserved. *pp. 131, 132.*

SAME. — *Evidence.* — *Conflict.* — The fact that there is no conflict in the evidence on one or more essential facts furnishes no ground for the reversal of a judgment in favor of defendant, where there is a sharp conflict as to certain other facts which plaintiff was required to establish before he was entitled to a verdict. *p. 132.*

From Whitley Circuit Court; *J. W. Adair*, Judge.

Action by Charles N. Williams against Grant Chapman. From a judgment for defendant, plaintiff appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

J. F. Carson, C. N. Thompson and W. J. Taylor, for appellant.

E. K. Strong, for appellee.

HADLEY, C. J. — A reversal of the judgment in this case is asked for error of the court in refusing a witness in appellant's behalf to answer a certain question, for errors in refusing and in giving to the jury certain instructions, and because the verdict is not sustained by the evidence, and is contrary to law.

1. The record shows that appellant propounded to his witness a question. Appellee objected, and the objection was sustained. This closed the incident. To have made the ruling available for review on appeal, it was necessary for appellant to have made a statement of what he could and proposed to show by the answer of the witness. This

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he did not do. *Cincinnati, etc., R. Co. v. Lutes*, 112 Ind. 276; *Elliott v. Russell*, 92 Ind. 526-530; *Louisville, etc., R. Co. v. Smith*, 91 Ind. 119; *Breedlove v. Breedlove*, 27 Ind. App. 560.

2. The record further shows that: "Afterward, on November 22, 1900, * * * the following further proceedings were had in this cause, to wit: * * * Come now the parties by their attorneys, * * * and the court now instructs the jury in writing, which instructions are made a part of the record without a bill of exceptions, each instruction having written on the margin 'Refused and excepted to,' or 'Given and excepted to,' all signed, 'Joseph W. Adair, judge, November 22, 1900.'

"State of Indiana, Whitley county: ss. In the Whitley Circuit Court, November term, 1900. Charles N. Williams v. Grant Chapman. The plaintiff requests the court to charge the jury especially as follows:" Next ensues six propositions, signed by the plaintiff's attorney, and each with a marginal memorandum, "Refused and ex. to by the plff. J. W. Adair, judge. October 22, 1900." Next follows, without any sort of recital, what purports to be ten instructions, each with this marginal note, "Given and excepted to by the plff. November 22, 1900. Joseph W. Adair, judge."

Appellee insists that the instructions are not in the record, because it does not appear that they were at any time filed as a part of the proceedings in the cause. Section 662 Burns 1901 provides what shall be deemed a part of the record on appeal, viz: "All proper entries made by the clerk, and all papers pertaining to a cause, and filed therein;" and it is further provided in clause 6 of §542, *supra*, that: "All instructions given by the court must be signed by the judge and filed, together with those asked for by the parties, as a part of the record." The filing note is in effect the court's seal of identity, by which the paper or document may be certainly known.

It has been held by this court that under the present code there are three ways of making instructions a part of the record: (1) By order of court; (2) by special exceptions written on the margin of each, signed by the judge, and dated; and (3) by a bill of exceptions; but in both the first two methods filing is required by the statute as a means of identification. *Ohio, etc., R. Co. v. Dunn*, 138 Ind. 18, and cases cited.

No effort appears to have been made to bring the instructions into the record by a bill of exceptions or order of court, but it was obviously attempted to bring them in by the second of the above methods (§542 Burns 1901); but because of a failure of the record to show that they were filed after the exceptions were properly reserved and noted, under many decisions of this court, we are required to hold that the attempt was unsuccessful. *Riley v. Allen*, 154 Ind. 176; *Thompson v. Thompson*, 156 Ind. 276; *Krom v. Vermillion*, 143 Ind. 75; *Olds v. Deckman*, 98 Ind. 162; *Supreme Lodge, etc., v. Johnson*, 78 Ind. 110.

3. The action is founded upon a written contract, which appellee admits he executed, whereby appellant was employed by appellee to procure a loan for the latter. The controversy is whether, under the contract, appellant did all the things he was required to do before calling upon appellee for performance on his part, and whether appellant did not, after the execution of the contract, change his relation to the transaction from that of appellee's agent to a principal. On both these latter propositions the evidence is conflicting.

It is argued that the verdict of the jury is not sustained by the evidence, and is contrary to law. When there is a conflict in the evidence on any fact essential to recovery, we can not disturb a judgment for the defendant, because we can not weigh the evidence.

It is contended that the verdict has no evidence in its support, because it is shown, without conflict, that appellee

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executed the contract sued on, and had notice of the acceptance of the loan within the time stipulated. The position is untenable. Because there appears no conflict in the evidence on one or more essential facts furnishes no warrant for a reversal, where, as in this case, there is a sharp conflict as to facts which the plaintiff was required to establish before he was entitled to the verdict.

Judgment affirmed.

RASTETTER v. REYNOLDS ET AL.

[No. 19,821. Filed February 25, 1903.]

CONTRACTS.—*Customs and Usages.*—*Evidence.*—In an action to recover the purchase price of certain elm strips "1½x1x7 ft. long," ordered by defendant of plaintiff, it was proper to allege and prove a custom and usage among lumbermen in the locality that the dimensions of the strips were to be taken at the time they were sawed in the green and with knowledge that the strips would shrink when dried. *pp. 134-138.*

CUSTOMS AND USAGES.—*Contracts.*—To authorize the proof of a commercial usage or custom in explanation of a contract it is not necessary that the usage should have existed for any considerable length of time, but it is sufficient if it was known to the parties at the time they entered into the contract. *p. 138.*

SALES.—*Delivery.*—*Acceptance.*—In an action for goods sold and delivered, the seller is entitled to recover the contract price if he has delivered the property to the purchaser, or done such acts as vested the title in the purchaser if he had accepted it. *p. 139.*

CUSTOMS AND USAGES.—*Extent.*—Commercial usages need not be coextensive with the State. *p. 140.*

SAME.—*Evidence.*—In an action for the purchase price of certain lumber, plaintiff alleged a custom or usage among lumbermen that the dimensions of the lumber were to be taken at the time it was sawed, and proved the same by a number of witnesses. It was also shown that plaintiff had sawed and shipped two car loads of similar lumber to defendant prior to the controversy, and all were the same thickness as the order in this case, and was sawed in the green of the dimensions ordered, and accepted by defendant. *Held*, to support a finding that the custom was known to defendant. *pp. 140, 141.*

APPEAL AND ERROR.—*Instructions.*—*Joint Exception.*—A joint exception to the action of the court in refusing to give certain instruc-

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tions is not available if any one of the instructions was correctly refused. *p. 141.*

From Whitley Circuit Court; *J. W. Adair*, Judge.

Action by Melvin E. Reynolds and others against William C. Rastetter for goods sold and delivered. From a judgment for plaintiffs, defendant appeals. Transferred from Appellate Court, under §1837u Burns 1901. *Affirmed.*

Robert Dreibelbiss, Allen Zollars, C. H. Worden and F. E. Zollars, for appellant.

Wilmer Leonard and Elmer Leonard, for appellees.

MONKS, J.—This was an action brought by the appellees, doing business as partners, against the appellant, as surviving partner, to recover judgment for goods sold and delivered by appellees to appellant's firm. A trial of said cause resulted in a verdict and judgment for appellees.

The errors assigned and not waived call in question the sufficiency of the fourth paragraph of complaint, the action of the court in overruling appellant's motion to strike out parts of said fourth paragraph of complaint, in overruling the appellant's motion for judgment in his favor upon the answers to the interrogatories, notwithstanding the general verdict, and in overruling appellant's motion for a new trial.

The fourth paragraph of complaint alleges that the appellant is the sole, surviving partner of the firm of Louis Rastetter & Son, and that he has in his hands sufficient assets to pay all partnership indebtedness, including the claim of appellees; that for many years prior to September 25, 1895, appellees were engaged in the business of sawing elm strips, and the said firm of Louis Rastetter & Son, long prior to the aforesaid date, was engaged in the business of buying said strips. It is further alleged that, "prior to said date, a custom had grown up among those who sawed said strips and those who purchased the same that the dimensions of said strips were to be taken at the

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time of sawing the same; that orders therefor were given with the understanding that the same would be sawed in the green to the size as ordered, and with the knowledge that such strips would shrink after they were dried; that this custom was well known to both the plaintiffs and said Louis Rastetter & Son; and that the dealings had between said plaintiffs and said Louis Rastetter & Son were had with reference to said custom, and that said custom became, and was, a part of the contract" entered into between the parties. The order given by said firm of Louis Rastetter & Son to the appellees is then set forth as follows: "Ft. Wayne, Ind., Sept. 25, 1895. Reynolds Bros., Corunna, Ind. Gentlemen: In reply to your inquiry of the 24th inst., to hand, will say we are always in the market for genuine rock elm strips, $1\frac{1}{4} \times 1 \times 7$ feet long, which, however, must be sawed straight grained, clear, free from knots and other imperfections, as shakes, bird pecks, etc., for which we will pay five cents per strip, f. o. b. this city. If you will send the car you have immediately, then advise us and oblige, yours, etc., Louis Rastetter & Son, by W. C. Rastetter." Then follow the allegations that said order was accepted by appellees, and that said strips were sawed according to order, but that appellant's said firm refused to inspect the same at appellees' mill immediately upon their being sawed out, as said firm had agreed and promised to do, and that subsequently they refused to accept the same, for the reason that, during the interim, the strips had shrunken, although they well knew that said shrinkage was to be anticipated, when they gave said order. It was further alleged that said strips were sawed, sold, and delivered to said firm of Louis Rastetter & Son, at their special instance and request, and that they were of the value of \$550.60, and that said sum is now due and wholly unpaid. Wherefore, etc.

Appellant unsuccessfully moved to strike from this paragraph so much thereof as pertained to the custom alleged

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to exist in business of the nature of that out of which this transaction arose. His demurrer to said paragraph for want of facts was also overruled by the court. Appellant insists that there was a contract between the parties in this case which was entirely clear and free from ambiguities, not subject to be varied by parol proof of custom or usage alleged to have existed in such business, and that, therefore, it was not proper for the appellees in their complaint to allege, and by their evidence to prove, a usage intended to be explanatory of the language of appellant's order.

Common terms, however, may, in a particular business or trade, acquire a peculiar and different signification from that generally given to them. It is perfectly well settled that when parties enter into a contract with reference to a particular business or trade they are presumed to have contracted with reference to any usages of that business or trade, and their contracts are to be interpreted consistently with such usage. Peculiar expressions are to be given that meaning which they have acquired in such business by common usage, unless, by the express terms of the contract, the usage is excluded, or is inconsistent with the contract. *Van Camp Packing Co. v. Hartman*, 126 Ind. 177, 179; *Lyon v. Lenon*, 106 Ind. 567, 572; *Morningstar v. Cunningham*, 110 Ind. 328, 334, 59 Am. Rep. 211; *Prather v. Ross*, 17 Ind. 495; *Hibler v. McCartney*, 31 Ala. 501, 506; *Lowe v. Lehman*, 15 Ohio St. 179; *Dwyer v. City of Brenham*, 70 Tex. 30, 7 S. W. 598; *Gunther v. Atwell*, 19 Md. 157; *First Nat. Bank v. Fiske*, 133 Pa. St. 241, 242, 19 Atl. 554, 7 L. R. A. 209, 19 Am. St. 635; 27 Am. & Eng. Ency. Law, 809-815; Clarke's Browne on Usages and Customs, §§41, 42; Lawson, Usages and Customs, §§17, 24; Beach, Contracts, §§581, 747, 758, 1746. It appears from the allegations of said fourth paragraph that said strips were sawed in the green of the dimensions named in said order, and that if they had been delivered at that time they would have been of the proper

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size; that the delay in the delivery of said strips was caused by appellant's failure to send to appellees' mill a man to inspect and measure the same at the time they were sawed; that during the time of this delay the strips shrunk so that when delivered they were not of the dimensions named in the order. It is clear, therefore, that the usage is not set up in said paragraph to contradict or nullify the contract, but to explain and show what contract the parties made.

Contracts of the kind here involved may, on their face, seem clear, but in the particular instance, in connection with the business to which they pertain, be ambiguous. Thus, in *Hibler v. McCartney, supra*, it was permitted to be explained that the expression "dangers of the river" used in a bill of lading, really by the usage of the business, included also dangers by fire. In *Soutier v. Kellerman*, 18 Mo. 509, the contract called for the sale of shingles at a certain price per thousand, a perfectly clear expression ordinarily and abstractly considered; yet it was held competent to show that by the usage of the business two bunches of shingles of certain dimensions, regardless of the number of shingles actually contained in the bunches, constituted a thousand, and that a delivery upon such a basis was within the terms of the contract. In the English case of *Smith v. Wilson*, 3 Barn. & Ad. 728, the contract of sale called for 1,000 rabbits, yet the purchaser was permitted to insist upon a delivery of 1,200 rabbits, in virtue of a usage of that trade by which 1,000 rabbits had come to mean 100 dozen, or 1,200 rabbits. So, in a contract for the furnishing and laying of bricks at so much per thousand, it was permitted to be shown that the expression "per thousand" in that business really meant a portion of the completed building, of certain dimensions, without reference to the actual number of bricks therein contained. *Lowe v. Lehman*, 15 Ohio St. 179. See, also, *Humphreysville Copper Co. v. Vermont Copper, etc., Co.*, 33 Vt. 92; *Dwyer v. City of Brenham*, 70 Tex. 30, 7 S. W. 598; *Wilcox v. Wood*, 9

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Wend. 346; *Gunther v. Atwell*, 19 Md. 157; *Lawrence v. Gallagher*, 42 N. Y. Super. Ct. 309. In *Walls v. Bailey*, 49 N. Y. 464, 10 Am. Rep. 407, a written contract provided that the plastering of a house was to be done at a fixed price per square yard, and it was held competent to show that it was the usage of plasterers in that particular place to measure the full surface of the walls, without deductions for doors, windows, etc.

In *Barton v. McKelway*, 22 N. J. L. 165, a contract for the delivery of certain trees from a nursery provided that the trees were to be not less than one foot high. The dispute was as to the measurement, and evidence was held competent of a usage in the trade to measure only to the top of the ripe, hard wood, and not to the top of the tree. See, also, *Hinton v. Locke*, 5 Hill (N. Y.) 437; *Wilcox v. Wood*, *supra*; *Ford v. Tirrell*, 9 Gray 401, 69 Am. Dec. 297; *Morningstar v. Cunningham*, 110 Ind. 328, 334, 335, 59 Am. Rep. 211.

It is objected that said fourth paragraph does not show that the usage had existed for any considerable length of time. It is not necessary that a usage should have existed from time immemorial, or that it should have existed for any considerable length of time; it is sufficient if it were known to the parties at the time they entered into the contract. *Lawson, Usages and Customs*, §17; *Clark, Contracts*, 583, 584; *Morningstar v. Cunningham*, *supra*; *Chateaugay, etc., Iron Co. v. Blake*, 144 U. S. 476, 486, 12 Sup. Ct. 731, 36 L. Ed. 510; *Patterson v. Crowther*, 70 Md. 124, 130, 16 Atl. 531; *Thompson v. Hamilton*, 12 Pick. 425, 23 Am. Dec. 619. It is directly alleged in said fourth paragraph, "That this custom was well known to both the plaintiffs and said Louis Rastetter & Son," and that the dealings between the parties were had with reference to this custom. It is evident, therefore, that the court did not err in overruling the motion to strike out. For

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the same reason said paragraph was sufficient as against appellant's demurrer for want of facts.

In support of his sixth assignment of error, that the court erred in overruling appellant's motion for judgment upon the answers to the interrogatories, notwithstanding the general verdict, it is urged by counsel for appellant that said fourth paragraph, and, indeed, the entire complaint, proceeds upon the theory of an action for goods sold and delivered, while the answers of the jury to the interrogatories submitted by appellant clearly show that appellant's firm never, at any time, accepted the goods in question, that the action for goods sold and delivered can be maintained only by showing an acceptance, and that, upon the familiar principle that the plaintiff must recover upon the theory of his complaint, or not at all, the appellant was entitled to judgment upon the answers to the interrogatories, notwithstanding the general verdict. While there is not a unanimity of judicial opinion upon the question of acceptance of the goods sold in an action such as this, we think the rule established by the better reason is that, in an action for goods sold and delivered, the seller is entitled to recover the contract price if he has delivered the property to the purchaser, or done such acts as vested the title in the purchaser, or would have vested the title in him if he had accepted it. *Dwiggins v. Clark*, 94 Ind. 49, 48 Am. Rep. 140; *Pittsburgh, etc., R. Co. v. Heck*, 50 Ind. 303, 19 Am. Rep. 713; *Neal v. Shewalter*, 5 Ind. App. 147, 153; *Gardner v. Caylor*, 24 Ind. App. 521, 526, 527; *Ballentine v. Robinson*, 46 Pa. St. 177; *Adams*, Cases on Sales, 25; *Bement v. Smith*, 15 Wend. 493; *Nichols v. Morse*, 100 Mass. 523; *Rodman v. Guilford*, 112 Mass. 405; *McLean v. Richardson*, 127 Mass. 339; *Myer v. Tighe*, 151 Mass. 354, 24 N. E. 49; *Smith v. Edwards*, 156 Mass. 221, 30 N. E. 1017; *White v. Solomon*, 164 Mass. 516, 42 N. E. 104, 30 L. R. A. 537; *New England, etc., Co. v. Standard Worsted Co.*, 165 Mass. 328,

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43 N. E. 112, 52 Am. St. 516; *Barton v. McKelway*, 22 N. J. L. 165; *Fox v. Utter*, 6 Wash. 299, 33 Pac. 354; *Schneider v. Oregon, etc., R. Co.*, 20 Ore. 172, 25 Pac. 391; *Brigham v. Hibbard*, 28 Ore. 386, 43 Pac. 383; *Ozark Lumber Co. v. Chicago Lumber Co.*, 51 Mo. App. 555; *Izett v. Stetson, etc., Co.*, 22 Wash. 300, 60 Pac. 1128; *Hatch v. Oil Co.*, 100 U. S. 124, 134, 135; *Shawhan v. Van Nest*, 25 Ohio St. 490, 18 Am. Rep. 313, 15 Am. Law Reg. (N. S.) 153, and note, p. 160 *et seq.*; *Henning v. Powell*, 33 Mo. 468; *Dustan v. McAndrew*, 44 N. Y. 72; *White v. Harvey*, 85 Me. 212, 27 Atl. 106; Benjamin, Sales (Bennett's 7th ed.), Am. note, 736; Tiedeman, Sales, §112; Usher, Sales, §415; Mechem, Sales, §§757, 1618, 1662.

It is also contended that the usage must have existed throughout the State, while the answers to the interrogatories show that the alleged usage prevailed in northern Indiana only. It is perfectly well settled that commercial usages need not be coextensive with the State. *Harper v. Pound*, 10 Ind. 32, 36; *Grant v. Lexington, etc., Ins. Co.*, 5 Ind. 23, 61 Am. Dec. 74; *Spears v. Ward*, 48 Ind. 541; 545; *Cox v. O'Riley*, 4 Ind. 368, 373, 58 Am. Dec. 633; *Morningstar v. Cunningham*, 110 Ind. 328, 334, 59 Am. Rep. 211; *Fulton Ins. Co. v. Milner, etc., Co.*, 23 Ala. 420, 427, 428. Even the usage of a particular person or firm may enter into and become a part of a contract with such person or firm, if it be known to the other contracting party. *Morningstar v. Cunningham, supra*; *Hursh v. North*, 40 Pa. St. 241, 243; *Fulton Ins. Co. v. Milner, etc., Co., supra*; Lawson, Usages and Customs, §17; Clark, Contracts, 583, 584.

It is next insisted by appellant that there was no evidence proving that the usage alleged was known to appellant's firm. Several witnesses by their testimony supported the allegations of the fourth paragraph of complaint in regard to the usage among sawmill men and those dealing with them. It

also appears that appellees had sawed and shipped two car loads of rock elm strips on orders from appellant before the one in controversy here; that one car load was shipped to appellant's firm in April, 1895, and the other in July, 1895; that said strips were ordered seven and eight feet long and all were the same thickness and width as in the order in this case. Said strips were, in conformity with said usage, sawed in the green, of the dimensions ordered, and were accepted by appellant's firm. Under these circumstances we can not say that the verdict of the jury was not, as to the question mentioned by appellant, sustained by sufficient evidence.

Appellant complains of the refusal of the court to give the instructions requested by him. Appellant's exception to this action of the court was joint as to all of the instructions so refused, and, under a well settled rule, is not available if any one of said instructions was correctly refused. Ewbank's Manual, §28. As some of said instructions were correctly refused, said exception is not available.

Other objections are urged under the motion for a new trial; but, so far as material, they are founded upon propositions already considered and determined against appellant. Judgment affirmed.

SMITH ET AL. v. AMERICAN CRYSTAL MONUMENT COMPANY ET AL.

[No. 19,917. Filed November 25, 1902. Motion to reinstate overruled February 25, 1903.]

APPEAL.—*From Appellate Court.*—*Record.*—*Affidavit.*—In an appeal from the Appellate to the Supreme Court, on the ground that the amount in controversy exceeds \$3,000, an affidavit as to the amount in controversy, which was filed in the Appellate Court, is no part of the record and will not be considered. *pp. 142, 143.*

SAME.—*From Appellate Court.*—*Jurisdiction of Supreme Court.*—*Amount in Controversy.*—Under §10, clause 3 of the act of 1901 (Acts 1901, 565), providing for appeals from Appellate to Supreme Court in

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certain cases, the words "amount in controversy" refer only to money demands and money judgments. *p. 143.*

From Hamilton Circuit Court; *J. F. Neal*, Judge.

Suit by Henry R. Smith and others against American Crystal Monument Company and others. From a judgment for defendants, plaintiffs appealed to Appellate Court, where the judgment of trial court was affirmed (29 Ind. App. 308). Appealed to Supreme Court, under clause 3 of §1337j Burns 1901. *Appeal dismissed.*

S. M. Unger, for appellants.

I. W. Christian, *W. S. Christian* and *E. E. Cloe*, for appellees.

HADLEY, C. J.—Appellants, plaintiffs below, having been unsuccessful in both the circuit and the Appellate Court, prosecute the appeal. The governing statute is in these words: "The jurisdiction of the Appellate Court shall be final, except under the following conditions: * * * (3) In any case decided by either of said divisions of the Appellate Court any losing party shall have the right to appeal to the Supreme Court, only when the amount in controversy, exclusive of costs and interest on the judgment of the trial court, exceeds \$6,000." Acts 1901, p. 565, §10, §1337j Burns 1901.

Accompanying the record is the affidavit of an attorney for the appellants, to the effect that the amount in controversy, exclusive of interest and costs, exceeds \$6,000. The complaint upon which the case was tried is in two paragraphs. The first seeks and prays specific performance, possession of real estate, and the quieting of title, but asks no money judgment. The second prays judgment for possession of real estate, and for \$1,000 as damages for withholding the same. Neither paragraph discloses the value of the land sought to be recovered. We are thus called upon to decide what is meant by the term "amount in controversy," as employed in the statute. It is plain that the

statute makes the jurisdiction of this court depend upon the existence of a particular fact, to wit, that the amount in controversy shall exceed \$6,000, and it is also plain that this jurisdictional fact must appear affirmatively from the record. We have no power to entertain an issue presented in this court for the first time, and receive extrinsic evidence to ascertain whether we may or not proceed to determine the appeal. Under the act of 1901, of which the section quoted is a part, appeals from the Appellate Court to this court as of right are limited to the class of cases therein specified; and it is the settled rule—certainly in this State—that where the law expressly limits jurisdiction the record must show upon its face that the case is within the limitation, or the court will have no power to act. *Jolly v. Ghering*, 40 Ind. 139; *Newman v. Manning*, 89 Ind. 422; *Wilkinson v. Moore*, 79 Ind. 397, 400; *Clayborn v. Tompkins*, 141 Ind. 19, 22; *Davenport Mills Co. v. Chambers*, 146 Ind. 156, 159. This record does not show this case to be within the appealable class: (1) Because we can not accept the affidavit as evidence of the amount in controversy, and (2) if we could accept it as evidence of the value of the land sued for, it would not sustain the appeal.

The language of the statute is "when the amount in controversy, exclusive of interest on the judgment of the trial court." Both phrases, "amount in controversy" and "interest on the judgment," import a controversy measurable in a sum of money, and can refer to money judgments only. These terms applied to controversies and judgments relating to the possession and ownership of property would be meaningless. As here, the gravamen of the action is for the recovery of land, with incidental damages for its detention; and it is the ownership of the land—the right of possession to the thing itself, and not its value—that is in controversy. We are therefore constrained to hold that money demands and money judgments only exceeding \$6,000 are appealable to this court under the third clause of said §10,

supra, and that all final decrees and judgments involving ownership or right of possession to property, unaccompanied by a *bona fide* demand, where the plaintiff appeals, or a money judgment for more than \$6,000 where the defendant appeals, are reviewable by this court under clause 3 of said §10, *supra*, and not otherwise.

It may be said that when a plaintiff sues to recover money, and the defendant denies his right to recover any amount, then, on appeal by an unsuccessful plaintiff, the amount demanded in good faith is the amount in controversy; but, when there has been a partial recovery, on appeal by the defendant the amount of the judgment is the amount in controversy. *Morton Gravel Road Co. v. Wy-song*, 51 Ind. 4.

Appeal dismissed.

STOY, ADMINISTRATOR, *v.* THE LOUISVILLE, EVANSVILLE AND ST. LOUIS CONSOLIDATED RAILROAD COMPANY ET AL.

[No. 19,993. Filed February 26, 1903.]

TRIAL.—Verdict.—Answers to Interrogatories.—A motion for judgment on the answers to the interrogatories notwithstanding the general verdict should be refused, unless the antagonism between the verdict and the answers is such, on the face of the record, as to be beyond the possibility of being removed by any evidence legitimately admissible under the issues. *p. 148.*

RAILROADS.—Crossings.—Contributory Negligence.—The rule requiring a traveler approaching a railroad crossing to look and listen can not be treated as an arbitrary standard of care, to be inflexibly applied by the courts in all cases, and the ruling of the court in rendering judgment for the defendant on answers to interrogatories, notwithstanding the general verdict, in an action against a railroad company for the death of plaintiff's decedent, on the ground that the interrogatories failed to show that decedent who was crossing a side-track on which detached freight-cars were standing, in order to board defendant's passenger-train, did not look in the direction of an engine standing on the side-track which moved the dead cars and killed decedent, was erroneous. *pp. 148-153.*

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165	223

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From Floyd Circuit Court; *W. C. Utz*, Judge.

Action by Lewis R. Stoy, administrator of the estate of Raymond P. Stoy, deceased, against the Louisville, Evansville & St. Louis Consolidated Railroad Company and its receiver. From a judgment for defendants on answers to interrogatories, notwithstanding the general verdict, plaintiff appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Reversed.*

H. M. Dowling, E. B. Stotsenburg and J. H. Weathers, for appellant.

A. P. Humphrey, J. D. Welman, C. L. Jewett and H. E. Jewett, for appellees.

GILLET, J.—Appellant instituted this action against said company and its receiver for the alleged wrongful killing of appellant's decedent, Raymond P. Stoy. The cause was put at issue, and a trial resulted in a verdict for appellant. In connection with the verdict, the jury answered forty-six interrogatories. Appellees moved for a judgment in their favor upon the answers to interrogatories. This motion the trial court sustained, over appellant's exception, and rendered judgment in favor of appellees. Whether this ruling was proper is the sole question that is presented for our consideration, and this question is still further narrowed by the admission of counsel for appellees that the ruling can only be upheld on the theory that the answers to the interrogatories disclose that said decedent Stoy was guilty of contributory negligence.

The answers to the interrogatories reveal the following facts: Just before his death, on the afternoon of March 1, 1898, said Stoy was proceeding south, at a brisk pace, along the east sidewalk of a public street in the village of Birdseye, for the purpose of taking an east bound passenger train that was then approaching said company's station in said village. Said station was situated immediately south of the

main track of said railway and immediately east of said street. It was necessary for Stoy to pass over a side-track, that was a few feet north of said main track, to reach said main track and said station. There were some detached freight-cars standing on said side-track just west of said street, and there were also some detached freight-cars standing on said side-track east of and near said street. A short distance beyond said last mentioned cars were some twenty freight-cars, with a locomotive attached to the east end thereof. The engineer of said freight-train backed the same up, upon the passenger-train approaching the station, presumably to get the locomotive and forward cars far enough into the siding so that the passenger-train could pass after it left the station. In closing up said freight-train, the detached cars to the east of the crossing were moved west at a rate of speed equal to three miles per hour, and, as Stoy was at that moment upon the crossing, he was knocked down by the rear car and killed. But a few moments before Stoy had been in the back part of a store that was on the east side of said street, and twenty-six feet north of the siding. On hearing the train, he passed hurriedly through the store, turned south when he reached the sidewalk, and proceeded towards the station. Stoy had been in the village frequently, and was familiar with the tracks at that point and with the vicinity generally. On the sidewalk, just south of the store, it was possible to see for 180 feet east along the siding; at a point half way to the crossing it was possible to look east along the siding 300 feet; and just north of the siding it was possible to see a train approaching on the siding from the east if it was within 400 feet. Our knowledge of what Stoy actually did in the matter of looking is limited to the answers to interrogatories forty and forty-four. These interrogatories and their respective answers are as follows: "(40) Did said Raymond P. Stoy turn his face sideways as he approached said

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crossing, looking to the southwest—towards said passenger-train? A. Yes. “(44) Did said Raymond P. Stoy, from the time he left Wells’ store until he got on the siding, look east on said side-track in the direction of the freight-train and dead cars? A. No.”

So much of the complaint as is material to the question presented is as follows: “That on the day aforesaid the said Raymond P. Stoy, having had business in that part of the said town of Birdseye north of said tracks, shortly before the time for the departure of the passenger-train of the defendants over said railroad for the said city of New Albany, proceeded along the street and public way which led to said platform and station, for the purpose of being transported as a passenger by the defendant on its passenger-train from said town of Birdseye to the city of New Albany; that at the time the said Raymond P. Stoy approached the said side-track and switch to cross the same, as he was compelled to do to reach said platform and station, four freight-cars, detached from a train and engine, were standing on said side-track and switch a short distance eastward from the street and crossing on, over, and along which the said Raymond P. Stoy was then and there carefully walking to reach said platform and station, to be carried as a passenger by the defendants; that some thirty feet eastward from the east end of the standing car farthest from said crossing was a long freight-train of the defendant; that just as the said Raymond P. Stoy was passing over the said side-track and switch, the defendants, by their servants and agents in charge of said freight-train, negligently and wrongfully caused said freight-train to be suddenly and violently run backward against said detached cars so standing on said side-track and switch, without signal or warning of any kind, so that the said Raymond P. Stoy was, without fault on his part, and solely by reason of the carelessness and negligence of the defend-

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ants, struck by said standing car so put in motion, knocked down, dragged, wounded, bruised, cut, run over, and killed."

The general verdict necessarily covers the whole issue, and solves every material question against the party against whom the verdict is rendered. The motion for judgment on the answers to interrogatories, notwithstanding the general verdict, should be refused, unless the antagonism between the verdict and the answers to interrogatories is such, on the face of the record, as to be beyond the possibility of being removed by any evidence legitimately admissible under the issues. *McCoy v. Kokomo R., etc., Co.*, 158 Ind. '662, and cases there cited.

The forty-fourth interrogatory is ambiguous, and the jury may have construed it as calling for an answer as to whether Stoy looked to the east on said side-track during the whole of the time in which he was passing from the store to the crossing; but in any event it does not preclude the idea that he looked as soon as he reached the southwest corner of said store. Especially does the answer to the said interrogatory fail to show that his face was not so inclined, even if he did not distinctively "look east," that the detached cars to the east of the crossing were wholly within his field of vision.

As shown, the complaint avers that said detached cars were standing "a short distance eastward from the street." The complaint warranted evidence that the car nearest the street was standing very near said street, and that the impact of the train suddenly caused it to move over said crossing. The question before us is not whether the jury should have acquitted Stoy of contributory fault in view of the evidence, but whether the answers to the interrogatories on their face show, in view of the issues, that such a conclusion ought not to have been reached.

We do not place much stress upon the ambiguity of the forty-fourth interrogatory, because the answers to other

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interrogatories probably show that the decedent might have seen the approaching train. If the rule is to be applied that is announced in many of our crossing cases, that, if a traveler has an opportunity to see, it must be presumed that he either saw, or was heedless of the danger, then it would be immaterial whether the decedent looked or not. But the question arises, is this a case where it can be declared, as a matter of law, that the decedent was bound to look as far east along the side-track as his vision permitted?

The look-and-listen rule can not be treated as an arbitrary standard of care to be inflexibly applied by the courts in all cases. Wood, Railroads (2d ed.), §323. As applied to ordinary grade crossings, the danger is so great that the courts declare the *quantum* of care required as a matter of law. This case, however, is not within the general rule. *McWilliams v. Detroit, etc., Co.*, 31 Mich. 274; *Robinson v. Western Pac. R. Co.*, 48 Cal. 409; *Pannell v. Nashville, etc., R. Co.*, 97 Ala. 298, 12 South. 236; *Cleveland, etc., R. Co. v. Penketh*, 27 Ind. App. 210; *French v. Taunton Branch Railroad*, 116 Mass. 537; *Bonnell v. Delaware, etc., R. Co.*, 39 N. J. L. 189; *Ferguson v. Wisconsin Cent. R. Co.*, 63 Wis. 145, 23 N. W. 123.

The *McWilliams* case was a suit for wrongfully killing one Gumbleton. As he was proceeding along a sidewalk on a public street and crossing a side-track or spur, a freight-car was suddenly moved backward, and he was crushed between the car and a fence along the side of the street. The trial court directed a verdict for the defendant. The cause was reversed, Campbell, J., for the court, saying: "We have found no evidence of negligence in Gumbleton. The testimony indicates that he was crossing while the cars were standing still, and that they were suddenly started by the locomotive pushing against them to back them up. A passenger along the sidewalk of a public street has a right to expect some warning before any sudden movement of this kind, and there should be very plain proof of negligence to

bind him under such circumstances. The track was not a part of the business track of the Central Railroad, and no regular trains ran there. Any use of this special track must have been subordinated to the rights of the general public. It does not stand on the same footing with an ordinary track. If there was any testimony from which a jury could infer negligence in Gumbleton, which we have not discovered, it was not such as to shut the case from the jury." A recovery was upheld in *Robinson v. Western Pac. R. Co., supra*, under circumstances quite similar to the Michigan case, except that the train was on the main track. The case of *Cleveland, etc., R. Co. v. Penketh, supra*, was somewhat different in its facts from the case before us, but its reasoning is applicable here. In *Pannell v. Nashville, etc., R. Co., supra*, the Alabama supreme court declared that: "So long as the cars on either side of the highway were left stationary as if to be unloaded, and so long as an open space between the cars thus left was maintained at the crossing, such as was usually the case, this was an authority and invitation to the public to cross, and an implied guaranty that no risk would attend such crossing."

Our cases concerning injuries to travelers at ordinary railway crossings point out with no small degree of precision what care the traveler should exercise, but it is only necessary to note the reasons given in those cases to appreciate how inapplicable such reasons are to a case like the one at bar. The necessities of railroad traffic, the momentum of their trains, and the confinement of their movement to a track, entitles the company to a precedence in passing over a crossing; but the company should recognize that, apart from such necessary right of precedence, the traveler has as much right to use the crossing as it has, and this right upon the part of the traveler becomes much more than a mere theoretical right where it is proposed to start inert cars over a crossing. The right of precedence that the company is entitled to in the latter case can not arise until

it has given due notice of its purpose to occupy the crossing. To back suddenly over the crossing without signal or warning of any kind would be an act of the clearest negligence. Shearman & Redfield, Negligence (5th ed.), §471, and cases cited; Beach, Contrib. Neg. (2d ed.), §194.

To what extent is the above consideration a factor in determining whether the decedent was guilty of contributory fault? In Beach, Contrib. Neg. (2d ed.), §67, it is said: "When the defendant, by his own negligent or wrongful acts, or omissions, constituting a breach of legal duty, throws the plaintiff off his guard, or when the plaintiff acts in a given instance upon a reasonable supposition of safety induced by the defendant, when there is, in reality, danger, to which the plaintiff is exposing himself, in a way and to an extent which, but for the defendant's inducement, might be imputed to the plaintiff as negligence, sufficient to prevent a recovery, such conduct on the part of the plaintiff, so induced, will not constitute contributory negligence in law, and the defendant will not be heard to say that the plaintiff's conduct under such circumstances is negligent, for the purpose of a defense to the action. The defendant by his own negligent conduct, which has occasioned the conduct of the plaintiff, is estopped, in a certain sense, from making the defense that the plaintiff's conduct was negligent, or in other words, he is not to be allowed, first, to induce the plaintiff to be careless, and then to plead that carelessness as a defense to an action brought against him for the mischief that has been the result. The defendant must not take advantage of his own wrong in such a way as that." See, also, *Chicago, etc., R. Co. v. Boggs*, 101 Ind. 522, 51 Am. Rep. 761. We are not required to go on the contested ground as to how far a person (apart from any implied representation of safety) may rely upon the supposition that another will not injure him by an act of negligence, nor is it necessary to affirm that the decedent might confide himself to the safe keeping

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of the company to the extent that a passenger might have done. It is enough to affirm in this case that there was so far an appearance of safety—whether there was an implied invitation to cross or not—that the situation as it appeared, to the extent that it seemed to denote safety, was proper to be considered as a component part of the whole transaction.

It is true that at an ordinary grade crossing the traveler must first vigilantly exercise his senses before placing any reliance upon the supposition that the company will perform its duty (*Malott v. Hawkins*, 159 Ind. 127, and cases cited), but this holding is based upon the fact that the danger of a train dashing over the crossing is too great to justify a reliance upon such supposition alone; but where inert and detached cars stand on either side of a crossing, we think that the traveler's conduct should be viewed in the light of the situation as it presented itself to him.

In this case the decedent was about to pass over a side-track, where the company had cut the crossing for the convenience of travelers upon the street; the cars on either side thereof were not only inert, but detached; it was in the vicinity of the station; a passenger-train was approaching on the main track, and, although decedent did not have the standing of a passenger, yet he was not far removed from such right. In these circumstances the answers to interrogatories do not enable us to say that the jury might not have been justified, under such evidence as might have been introduced under the issues, in returning a verdict for the appellant. It is thoroughly settled that where the court can perceive that reasonable men might honestly differ in their conclusions as to whether negligence or contributory negligence existed, the question can not be determined as a matter of law. *Rogers v. Leyden*, 127 Ind. 50, 57; *City of Franklin v. Harter*, 127 Ind. 446, 448; *Cleveland, etc., R. Co. v. Harrington*, 131 Ind. 426; *W. C. DePauw Co. v. Stubblefield*, 132 Ind. 182, 185; *Cincinnati, etc., R. Co. v. Grames*, 136 Ind. 39, 50; *Young v. Citizens St. R. Co.*,

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148 Ind. 54; *DePauw Plate Glass Co. v. City of Alexandria*, 152 Ind. 443; *Chicago, etc., R. Co. v. Thomas*, 155 Ind. 634.

Judgment reversed, with directions to the trial court to overrule appellees' motion for judgment on the interrogatories, and to render judgment for appellant on the general verdict.

Dowling, J., took no part in the consideration of this case.

OSBORN v. HALL ET AL.

[No. 20,008. Filed February 28, 1903.]

MORTGAGES.—*Record.*—*Mistake.*—*Lien.*—Where real estate is sold subject to a mortgage as shown by the record, and the purchaser is without knowledge that there was a mistake in the record, the mortgage is a lien on the land for no greater amount than that named in the record. *pp. 157, 158.*

ALTERATION OF INSTRUMENTS.—*Promissory Note.*—*Change of Rate of Interest by Payee.*—The alteration of a promissory note by the payee, by changing the rate of interest from eight per cent. to seven and one-half per cent. to make the note conform to the agreement between the parties, is not such an alteration as will vitiate the note. *pp. 158-162.*

From Hendricks Circuit Court; *R. W. McBride*, Special Judge.

Suit by Mary A. Osborn against Douglas Hall and others. From a judgment for defendants, plaintiff appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed in part, and reversed in part.*

R. T. Hollowell, W. N. Harding, A. R. Hovey and C. S. Wiltsie, for appellant.

E. G. Hogate and J. L. Clark, for appellees.

JORDAN, J.—Action by appellant in the lower court against appellees herein, defendants below, to recover a balance alleged to be due and unpaid on a promissory note executed by Douglass Hall to appellant, and to foreclose a

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mortgage executed by the said Hall and wife to secure the payment of the note in suit when due. The issues tendered by the answer filed by the defendant Hall in regard to the note in suit were payment and *non est factum*. The defendant John T. Hocker pleaded in his answer to the complaint: (1) The general denial; (2) payment; and (3) facts disclosing that he was the owner of the land against which the plaintiff sought to foreclose her mortgage by purchase from Hall and wife, the mortgagors; that the said premises were conveyed to him by the latter by warranty deed, subject to a mortgage of \$1,308, executed to the plaintiff, as shown by the record of said mortgage, as the same had been recorded in the recorder's office of Hendricks county, Indiana, in which county the mortgaged premises were situated; that the mortgage as it appeared of record in the recorder's office showed that it had been executed to secure only \$1,308, as evidenced by a promissory note; and that said defendant, without any notice or knowledge to the contrary, relied upon the record of the mortgage, and settled with Hall, from whom he purchased the real estate, accordingly, and when the principal note fell due he paid plaintiff \$1,308, the amount thereof as shown by the record of the said mortgage, together with all of the accrued interest thereon, and demanded that she satisfy the mortgage, which she refused to do. The prayer of the answer was that under the alleged facts no decree of foreclosure against the land so held by the defendant be rendered. The issues were joined between the parties on the complaint, answers and reply, and on the trial the court, by request, made a special finding of facts, and stated its conclusions of law thereon against the plaintiff and in favor of the defendants, and rendered judgment, over a motion for a new trial, against the plaintiff for costs.

It appears that the plaintiff in her complaint alleged that on July 25, 1896, "Douglass Hall, by his promissory note, a copy of which is filed herewith marked exhibit A,

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and made a part hereof, promised to pay the plaintiff the sum of \$1,380 with interest at seven and one-half per cent., which interest was evidenced by coupon notes, all of which have been fully paid up to July 25, 1900." The copy of the note filed with the complaint, and marked exhibit A, expressly fixes the rate of interest at eight per cent. per annum, instead of seven and one-half per cent. as declared by the plaintiff in her complaint.

The special finding discloses the following facts: Douglass Hall and his wife, on July 25, 1896, executed a mortgage to plaintiff upon certain real estate, described, situated in Hendricks county, Indiana, to secure the payment, when due, of one principal promissory note for \$1,380 of even date, and due four years from the date thereof; that the mortgage also secured the payment of four coupon interest notes of the same date, each for the sum of \$103.50, payable in one, two, three, and four years from the date thereof, respectively, each bearing eight per cent. interest per annum after maturity; that all of the aforesaid notes were payable to the order of the plaintiff Mary A. Osborn at the First National Bank of Danville, Indiana; that on the 5th day of August, 1896, said plaintiff left the mortgage, so executed, for record with the recorder of said county, and the recorder undertook to record it in mortgage record No. 31, at page 383, in his office, but in so recording the said mortgage it was stated in the record thereof that the principal note executed by the mortgagor was \$1,308, instead of \$1,380, as stipulated in said mortgage; that thereafter Hall sold the said real estate to the defendant John T. Hocker, subject to said mortgage in favor of the plaintiff Osborn, which was represented at the time by said Douglass Hall to be of the face value of \$1,308; that before receiving the deed of conveyance from the said Hall, Hocker examined the mortgage record No. 31, at page 383, being the record in and upon which the said mortgage executed by Hall and wife to the plaintiff had been recorded,

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and there discovered that the same, as recorded, secured the principal sum of \$1,308 together with four coupon interest notes, each for the sum of \$103.50, and when Hocker purchased the land and received the deed of conveyance therefor he in good faith believed that the principal sum which the mortgage was given to secure was \$1,308, and he had no knowledge or information to the contrary; that thereafter, at the times the interest fell due on the mortgage indebtedness, Hocker paid to the duly authorized representative of Mary A. Osborn the interest thereon as represented by the coupons, and on the 25th day of July, 1900, the day on which the principal sum of the mortgage indebtedness matured, he paid to the duly authorized agent of the plaintiff the principal sum of said mortgage indebtedness as the same appeared of record, to wit, \$1,308, and all interest due thereon, and requested that the mortgage be released and satisfied of record. He was then informed that the principal sum secured by the mortgage was \$1,380, and not \$1,308, as the same appeared upon the record, and this was the first knowledge that Hocker received that the mortgage was executed for any other or greater sum than \$1,308. Under the contract and agreement between the plaintiff Mary A. Osborn, and the defendant Douglass Hall, it was agreed that the principal note should bear interest at the rate of seven and one-half per cent. per annum until paid. Hall executed to the plaintiff his said four several coupon interest notes of \$103.50 each, which evidenced the interest thus agreed upon, but the principal note as actually executed by the defendant to the plaintiff provided that he should pay interest at eight per cent. per annum until paid, the rate therein being indicated by the printed word "eight." After the execution of the principal note, and before its maturity, the plaintiff, without the knowledge or consent of Hall, placed over the word eight in the said principal note the figures "7½" with a lead-pencil, and without erasing the printed word eight, other

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and except that the lower part of the vertical line of the figure 7 passed through the letter "h" in the word eight, and the figure 2 in the fraction was inserted between the words eight and per. These figures, as the court finds, were made without any intent to defraud, and without any intention to change the character of the obligation, but with the intent of changing the rate of interest as printed in the note to the rate of interest as agreed upon between the parties, and as shown or expressed in the said several coupon interest notes. Hall had no knowledge that these figures made by the plaintiff with the lead-pencil were placed in the said note until after the commencement of this action, and never consented thereto. Upon the facts as found the court concludes that the plaintiff was not entitled to a foreclosure of her mortgage, or to recover anything upon the note in suit; that the defendants were entitled to recover their costs; to all of which conclusions exceptions were properly reserved by the plaintiff.

The errors assigned are: (1) The court erred in its conclusions of law; and (2) in denying appellant's motion for a new trial.

Appellant insists upon a reversal of the judgment in this case as against Hall, on the ground that under the special finding of facts he is shown to be liable on the note sued upon for the unpaid balance thereof; that no direct injury was done to appellees or either of them by the lead-pencil figures which the plaintiff placed in the note.

There is virtually no argument or contention on the part of appellant to dispute the correctness of the court's conclusions of law upon the facts to the effect that she was not entitled to foreclose her mortgage against the mortgaged premises, as the same were owned and held by Hocker under his purchase from the mortgagor. As shown, the mortgage as recorded on its face disclosed that the principal indebtedness which it was executed to secure was only \$1,308. Hocker, when he purchased the premises, had no

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knowledge that the mortgage had not been correctly transcribed on the public records. He, as it appears, examined the record, and in good faith relied upon what it exhibited on its face in respect to the principal indebtedness secured by the instrument as recorded. He, under the agreement made with his grantor, was to take the conveyance of the land subject to the amount shown by the mortgage as recorded, and he settled with the grantor in respect to the purchase money accordingly. This principal amount, together with all interest, he paid to appellant before she instituted this action. That the court's conclusion, under the facts, as to the defendant Hocker was right, is beyond controversy, and is well settled by the decisions of this court. *Mechanics, etc., Assn. v. Whitacre*, 92 Ind. 547; *State, ex rel., v. Davis*, 96 Ind. 539; *State, ex rel., v. Davis*, 117 Ind. 307; *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250; *State v. Fleming*, 124 Ind. 97.

As bearing upon the alleged alteration of the note made in respect to the rate of interest, the court finds that the contract or agreement between the plaintiff Mary A. Osborn and Douglass Hall at the time he obtained from her the loan of the principal sum—\$1,380—was that the note executed therefor should bear interest at the rate of seven and one-half per cent. until paid, and not at the rate of eight per cent. The interest at the rate of seven and one-half per cent. until the maturity of the principal note, it appears, was settled between the parties by coupon interest notes, each being executed by the payor to the payee for \$103.50, this amount being the interest for one year on \$1,380 at seven and one-half per cent. The special finding further discloses that the lead-pencil figures "7½ were made without any intent to defraud, and without any intention to change the character of the obligation, but with the intention of changing the rate of interest as printed in said note to the rate of interest as agreed upon between the parties, and as expressed in the said several coupon notes."

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Counsel for appellant insist that, inasmuch as it appears that the alteration made by appellant in the note in regard to the rate of interest, by reducing the latter from eight, as expressed in the note, to seven and one-half, was made by her, not with the intent to defraud the maker of the note, but with the honest purpose or intent to make the instrument conform to the actual agreement or contract of the parties in respect to the rate of interest, under such circumstances the alteration, even though material, can not be held to vitiate the note, and thereby defeat appellant's right to recovery thereon. In the light of the authorities controlling the question, we are constrained to concur in this view of the case. The question as here presented may be said to be an open one in our jurisdiction, and, while it may be asserted that there is some conflict of authority, nevertheless we are of the opinion that the character of the case at bar is such that in reason it can not be said to fall within the rule which affirms that every material alteration made by the payee or holder of a note after its execution without the consent of the payor will vitiate or render such instrument void; even though the alteration was honestly made and may be in favor of the maker thereof.

We concede and affirm as a legal proposition that the payee or holder of a promissory note has no right or authority, without the consent of the maker or makers thereof, to make any material alteration of the note for the purpose of correcting any mistake that may have been made in the execution thereof, unless it is shown that the alteration or change is made to correct the note so as to make it conform to what all of the parties thereto agreed or intended it should have been. An alteration for such purpose and to such extent the great weight of authorities sanction, and hold that it may be made without destroying the legal effect of the note or instrument. The full probative force of the facts as found by the court establish that appellant was prompted to make the alteration or correction in the rate

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of interest, as she did, by honest motives, and for the purpose or with the intent only to make the rate correspond to that which had been agreed upon by her and Hall, the maker of the note, at the time the latter obtained the loan. The rate of eight per cent., as expressed in the note, is apparently the result of a mutual mistake upon the part of both parties to the instrument. It appears by the finding that a blank note was used which contained the words printed therein, "with interest at eight per cent. per annum until paid." It would seem that the mistake in regard to the rate of interest was due to the inadvertence of the parties in omitting to change the printed word "eight," as it appeared in the blank note, to seven and one-half, the rate of interest upon which the parties had actually agreed. The following authorities fully sustain the proposition, under the facts in this case, that, even if the alteration can be said to have been material, it did not serve or operate to vitiate the note and thereby defeat appellant's right to a recovery thereon. *McRaven v. Crisler*, 53 Miss. 542; *Duker v. Franz*, 70 Ky. 273, 3 Am. Rep. 314; *Hervey v. Harvey*, 15 Me. 357; *Wallace v. Tice*, 32 Ore. 283, 51 Pac. 733; *Foot v. Hambrick*, 70 Miss. 157, 11 South. 567, 35 Am. St. 631; *Jackson v. Johnson*, 67 Ga. 167; *Ames v. Colburn*, 77 Mass. 390, 71 Am. Dec. 723; *Chamberlain v. Wright* (Tex. Civ. App.), 35 S. W. 707; *Clute v. Small*, 17 Wend. 238; *Derby v. Thrall*, 44 Vt. 413, 8 Am. Rep. 389; 2 Am. & Eng. Ency. Law (2d ed.), 211, 212; Daniel, Negotiable Inst. (5th ed.), §§1403, 1404; Randolph, Com. Paper, §1765, and authorities cited.

In *McRaven v. Crisler*, *supra*, Chalmers, J., in speaking for the court in regard to the alteration of the note in that case, used language forcible and to the point, saying: "It was but the correction of a mistake so as to conform the note to the intention of both the parties to it, and it was made in such manner as clearly to negative any fraud upon the

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part of the payee, or any intention to obtain an advantage. That under these circumstances alterations in notes will not vitiate them, we think, is well settled. The only questions in such cases are, does the alteration actually conform to the true intention of both parties to the instrument, and was it honestly made to correct the mistake, and with no intent of procuring an advantage? Where these questions are answered in the affirmative, the law will presume or dispense with the assent of the maker of the note to its alteration." Citing authorities.

In *Ames v. Colburn, supra*, the date of the note in suit in that case had been altered by the payee in the absence of the maker, and without his knowledge, but without any fraudulent intent, and merely to make the date of the instrument conform to the facts. The date as altered was the day of the week and year which the parties supposed or intended to be the date of the execution of the note. The court in that case, in speaking in respect to the alteration in issue, said: "But as the arbitrator has found that it was made without any fraudulent intention, and merely to correct a mistake, and make the note such as both parties intended it should be and understood that it was, we are of opinion, upon the authorities, that the note was not vacated by the alteration, and that the plaintiff is entitled to judgment on the award."

In *Duker v. Franz, supra*, the date of the note as therein expressed was February 1, 1868. After the execution of the note this date was changed to February 1, 1869, which was the date upon which the note was executed. The court, in considering the alteration as made in the note in that case, said: "We agree that the holder of the note has no right to make an alteration to correct a mistake, unless to make the instrument conform to what *all parties to it agreed or intended it should have been*; but this much he can do without destroying the legal efficacy of the writing."

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It follows, and we so conclude, that the court erred in stating its conclusions of law upon the facts found, to the effect that appellant was not entitled to recover against appellee Douglass Hall upon the note in suit. The judgment in favor of appellee Hocker is affirmed, otherwise it is reversed at the cost of appellee Hall, and the cause is ordered to be remanded to the lower court, with instructions to restate its conclusions of law upon the facts in favor of appellant and against said Hall, and to render judgment accordingly.

Hadley, J., did not participate in the decision of this case.

THE CLEAR CREEK STONE COMPANY v. DEARMIN.

[No. 19,979. Filed February 27, 1908.]

APPEAL AND ERROR.—*Waiver*.—Alleged error in overruling a demurrer to a complaint is waived by failure to discuss it. p. 163.

MASTER AND SERVANT.—*Personal Injury*.—*Complaint*.—*Proximate Cause*.

—In an action for the injury of a servant while working in a stone quarry by the fall of a wire rope which extended from the top of a derrick to the end of a boom-pole used for lifting stone and other heavy articles, it was alleged that the wire rope was old and unfit for use; that it had been spliced by a smaller rope, and was too short; that the clamp which fastened the rope to the iron drum was defective, and that by reason of the defects in the derrick and its tackle, while the derrick was being used to lower a box of coal the wire rope suddenly fell from the mast and injured plaintiff. *Held*, that the complaint sufficiently shows the negligence charged to be the proximate cause of plaintiff's injury. p. 165.

TRIAL.—*Verdict*.—*Answers to Interrogatories*.—*Conflict*.—In an action for injuries to an employe caused by a rope giving away and falling upon him while lowering the boom-pole of a derrick, the jury found in answer to interrogatories that if the rope had been sufficiently fastened the boom could have been safely lowered to a horizontal position; that if the boom had been stopped when it reached a horizontal position, the rope would not have pulled loose; that the injury was caused by the failure to stop the settling of the boom before the rope ran off the drum on which it was wound; and that there was no "satisfactory evidence" that the boom was lowered below a horizontal position. *Held*, that the answers are not in conflict with a general verdict for plaintiff. pp. 166-168.

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TRIAL.—Instructions.—An instruction that if plaintiff "has proved the injury complained of was caused by some one or more of the specifications of negligence set out in the complaint, he may recover if he himself was without fault" is not bad for failure to observe the distinction between contributory negligence and assumption of risk, where none of the acts of negligence charged involved any question concerning assumption of risk. *p. 169.*

SAME.—Instructions.—Answers to Interrogatories.—Where the special finding of facts in an action for personal injuries shows that the defendant had knowledge of the defects and omissions complained of, and that the plaintiff was ignorant of them, an erroneous instruction on the subject of the knowledge of the parties was harmless. *pp. 169, 170*

SAME.—Interrogatories.—An interrogatory asking the jury to state in case they return a general verdict for plaintiff upon what paragraph of complaint the verdict was based was properly refused, since the information so sought was not such a "question of fact" on the issues of the cause as is contemplated by §555 Burns 1901. *p. 170.*

From Monroe Circuit Court; *J. C. Robinson*, Special Judge.

Action by Lawson E. Dearmin, by next friend, against the Clear Creek Stone Company for personal injuries. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under §1337j Burns 1901. *Affirmed.*

H. C. Duncan and *I. C. Batman*, for appellant.

J. R. East and *R. H. East*, for appellee.

DOWLING, J.—Action by the appellee, a minor, by his next friend, against the appellant for damages for a personal injury. Demurrers to the several paragraphs of the complaint were overruled, and motions for judgment for the appellant on the answers of the jury to questions of fact on the issues, and for a new trial, were denied. These rulings are assigned for error.

No objection to the first paragraph of the complaint is pointed out, and any error in the ruling on the demurrer to it is waived by the failure of counsel to discuss it.

The appellee was employed by the appellant at its stone quarry, and, while in the performance of his duties, he was

injured by the fall of a heavy wire rope which extended from the top of a derrick to the end of a boom-pole used for lifting and moving stone and other heavy articles.

It appears from the several paragraphs of the complaint that, at the time of the injury to the appellee, the appellant, as a part of the machinery used in its stone quarry, owned and employed a large steam derrick, with a mast pole fifty feet or more in height, held in a perpendicular position by guy-ropes, the lower end of which pole rested and revolved in a socket. Near the lower end of this mast another long piece of timber was attached to it by a large hinge. To the free end of the latter a steel wire rope was fastened, which extended to a pulley at the top of the mast, and ran from the pulley to a cast-iron drum, three feet long and eighteen inches in diameter, in the power-house of the appellant, some seventy-five yards distant. The wire rope was fastened to the drum by a metal clamp placed over the end of the rope and pressed down by a nut and screw. The drum was operated or moved by steam-power, and, by winding or unwinding the rope, raised or lowered the piece of timber which worked upon the hinge, and which was known as the boom-pole.

It is alleged in the second, third, and fourth paragraphs of the complaint that the wire rope was old and unfit for use; that it had been spliced the day before the accident with a smaller rope; that the smaller rope was attached to the iron drum; that the rope was too short; that the clamp which fastened the rope to the iron drum was defective, because it could not be screwed down tight upon the rope; and that while it was necessary that the wire rope should be long enough to leave several wraps of the rope around the iron drum when the boom-pole was lowered to the ground, yet in fact it was too short to do so. It is charged that the appellant was negligent in failing to tighten the clamp upon the rope, and in permitting the rope to slip off the iron drum; in permitting the premises in the vicinity of the said der-

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rick to become dangerous, through its failure properly to fasten the wire rope, and to keep the same fastened; and in failing to warn the appellee of the dangerous condition of the derrick, although the appellant knew what was necessary to make it safe. It is averred that by reason of the defects in the steam derrick and its tackle, which have been mentioned, all of which were known to the appellant, but not to the appellee, while the derrick was being used to lower a load or box of coal for the steam-engines in the quarry, the wire rope suddenly fell from the mast and injured the appellee, who was then and there engaged in and about his work. It is further alleged, as the conclusion of the statement of the facts constituting the appellee's cause of action, that all of the injuries sustained by him "were received by reason of the carelessness and negligence of defendant as herein set forth."

It is objected on behalf of the appellant that its negligence, as described in the complaint, is not shown by proper averments to have been the proximate cause of the injury to the appellee. But, as we have seen, all the defects in the wire rope and its fastenings were charged to the negligence of the appellant. The sudden fall of the rope is alleged to have resulted from these defects, and by its fall the appellee, who was passing under it, is said to have been injured. The connection between the negligent conduct of the appellant in permitting the defects in the wire rope and its fastenings to exist, and the sudden fall of the rope upon the appellee, who was then and there lawfully engaged in his work for the appellant, is very plainly stated. The sequence between the negligence of the appellant in failing to make the rope secure and the injury sustained by the appellee was natural and unbroken, and that negligence clearly appears to have been the proximate and sole cause of the accident and injury.

The further point is made that, while it is averred that at the time of the accident the boom-pole was being lowered

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to the ground, there is no allegation that this was a proper use of the boom, or that the appellant knew that the rope was too short for this particular purpose. There is nothing in the complaint which indicates that the derrick and boom were used in an improper or extraordinary manner, or which would authorize an inference that such was the case. If there had been any obscurity in the pleading in this respect, it should have been pointed out by an appropriate motion. However, we fail to perceive either obscurity or ambiguity in this part of the complaint, and are of the opinion that it was sufficiently shown by its averments that the derrick and boom-pole were being used for an ordinary purpose, and in the usual manner.

Upon the return of a general verdict against it, the appellant moved the court to disregard the verdict and to render judgment in its favor upon the answers of the jury to the questions of fact submitted to them. It is settled by many decisions of this court that the general verdict must stand unless the facts found, or some of them, are not only irreconcilable with the general verdict, but are of such vital and controlling nature as necessarily to overthrow the verdict. The provision of the code of civil procedure upon this subject is as follows: "When the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly." §556 Burns 1901, §547 R. S. 1881 and Horner 1901. To sustain a motion for judgment on the special finding of facts notwithstanding the general verdict, there must be such a conflict between the special finding and the general verdict that the two can not stand together. It is not necessary that the special finding should sustain the verdict. The verdict requires no such support. But the general verdict is controlled by the special finding only when the two can not be reconciled by any evidence admissible under the issues. *Rice v. City of Evansville*, 108 Ind. 7, 58 Am. Rep. 23; *Shuck v. State, ex rel.*, 136 Ind. 63, 71-75; *Mat-*

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chett v. Cincinnati, etc., R. Co., 132 Ind. 334, 337; *McCoy v. Kokomo R., etc., Co.*, 158 Ind. 662. The party demanding judgment upon the special finding must be able to point out a material fact or facts so found which, notwithstanding all intendments and presumptions in favor of the general verdict, and unaided by any intendment or presumption in its own support, would, if considered by the jury and given its necessary legal effect, have compelled them to return a verdict for the party so demanding judgment.

A very careful examination of the special finding and of the argument of appellant's counsel thereon has failed to discover any conflict between the special finding and the general verdict. Counsel have not pointed out to us any answer which, when read in connection with the other answers of the jury, necessarily overthrows the general verdict. None of the answers shows that the derrick, boom, or rope were used in an extraordinary or improper manner. It is nowhere shown that the appellee knew anything of the unsafe condition of the rope or its fastenings. His general knowledge that the quarry was a dangerous place in which to work was not inconsistent with his ignorance of the special defects of the rope and its fastenings, which materially increased the perils of the situation.

By their answers to interrogatories, the jury said that the clamp on the rope fastening it to the drum was not sufficiently tightened; that the slack in the rope was wound around the drum, and that if the rope had been sufficiently fastened the boom could have been safely lowered to a horizontal position. They also found that, at the time of the accident, the boom was lowered until it was "at or near a level," and that there was no "satisfactory evidence" that the boom was lowered below a horizontal position "to a point at which all the boom rope was unwound from the drum." They state also that the weight of the boom loaded with a box of coal caused the rope to jerk loose from its fastenings on the drum, and that if the boom had been

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stopped while being lowered when it reached a horizontal position, the rope would not have pulled loose from the drum, and that the injury to the appellee was caused by a failure to stop the settling of the boom before the rope ran off the drum. This is by no means a finding that the voluntary lowering of the boom below a horizontal position caused the accident. The evident meaning of the several answers is that when the boom was lowered until it was nearly level, its own weight and the weight of the box of coal caused a severe strain upon the coils of the rope on the drum and on the fastenings of the rope; that by reason of their defective and insecure condition the fastenings gave way; that the boom and rope were then beyond control; and that the descent of the boom could not be arrested by reversing the movement of the drum. Such a construction of these answers is natural, reasonable, and entirely consistent not only with the general verdict but with the other answers. The purport of the special finding is plainly shown in the response of the jury to the twenty-eighth and twenty-ninth interrogatories, which were as follows: "28. Could not the boom be lowered by releasing the power to a horizontal or level position? A. Yes, with proper fastenings. 29. Could not said derrick be safely operated with the boom at any point between the position almost perpendicular, and the horizontal or level position of the same? A. Yes, if properly fastened."

It was not found that the rope was properly or securely fastened to the drum, but that the failure so to fasten the rope was, as charged in the complaint, the cause of the accident and injury. The special finding lends no support to the proposition that the rope was properly secured, and that the accident was due to the fault of a fellow workman in directing and causing the boom-pole to be lowered too far.

The motion for a new trial assigns as reasons therefor: The giving and refusal to give instructions; the refusal to submit certain interrogatories to the jury; that the verdict

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is not sustained by sufficient evidence; and that it is contrary to law.

The portion of the second instruction which is objected to is as follows: "If he has proved the injury complained of was caused by some one or more of the specifications of negligence set out in the complaint, he may recover if he himself was without fault." Counsel complain that the court failed to observe the distinction between contributory negligence and assumption of risk. The instruction was expressly confined to "the specifications of negligence set out in the complaint." None of these involved any question concerning assumption of risk, and no reference to that subject would have been proper in that connection.

Instructions numbered three, seven, and twelve are objected to because they do not inform the jury that the servant must not only be free from fault, but that he must also be ignorant of the master's fault. The third instruction does not undertake to state the effect of knowledge of the defect or danger by the servant, and, considered by itself, might be open to criticism. But the sixth is full and clear upon the subject of knowledge, and the two read together contain a correct statement of the law. Instruction number seven distinctly informed the jury that the ignorance of the plaintiff of all the acts of negligence of the employer, and of his incompetent servant, was a necessary element of the plaintiff's right of recovery. Instruction number twelve is equally explicit, both as to the knowledge of the employer and the ignorance of the servant. The allegation in this last instruction that "if the appellant, by its superintendent, insecurely fastened the rope," etc., was equivalent to a direct averment of knowledge on the part of the appellant. We find in none of these instructions any misdirection of the jury authorizing a reversal of the judgment. It may be added that the special finding of facts shows that the appellant had knowledge of the defects and

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omissions complained of, and that the appellee was ignorant of them. This being the case, an erroneous instruction on the subject of the knowledge of the parties would have been harmless.

The appellant tendered interrogatories to be answered by the jury in case they returned a general verdict for the appellee, requiring them to state upon what paragraph or paragraphs they based their verdict. The court properly refused to submit these questions to the jury. The information so sought to be obtained was not such a "question of fact" on the issues of the cause as is contemplated by §555 Burns 1901, and the mode adopted by the appellant was not the proper one to ascertain the paragraph or paragraphs to which the verdict related. *Salem-Bedford Stone Co. v. Hilt*, 26 Ind. App. 543.

The verdict was amply sustained by the evidence, and was not contrary to law. Judgment affirmed.

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[No. 19,992. Filed February 27, 1903.]

PHYSICIANS.—Malpractice.—Complaint.—Contributory Negligence.—The nature of an action for the negligence of a surgeon in treating an injury is such as to bring it within the provisions of the act of February 17, 1899 (Acts 1899, p. 58), and it is, therefore, not necessary for the plaintiff to allege and prove want of contributory negligence. p. 172.

EVIDENCE.—Physical Examination in Presence of Jury.—In an action by a woman against a physician for negligence in treating an injury to her knee, it is not error for the court to refuse to permit another physician who was testifying as a witness for defendant to examine plaintiff's knee in the presence of the jury, since it would require a quasi public exposure of her person; and the fact that plaintiff subsequently offered to exhibit her knee to the jury did not operate to make the prior ruling improper. p. 173.

WITNESSES.—Physicians.—Privileged Communication.—Malpractice.—In an action against a surgeon for malpractice, a physician who had treated plaintiff after defendant's employment had terminated is incompetent to testify over plaintiff's objection. pp. 173, 174.

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WITNESSES.—*Malpractice.*—*Plaintiff as Witness.*—*Privileged Communications.*—In an action against a surgeon for negligence in treating plaintiff's knee, the plaintiff can not be required to testify as to the manner of treatment by a physician employed after defendant's employment had terminated. pp. 174, 175.

PHYSICIANS.—*Malpractice.*—*Instruction.*—*License.*—In an action against a surgeon for malpractice, an instruction as to the degree of skill required of a physician is not erroneous for failure to state that the physician must have a license to practice. p. 175.

TRIAL.—*Incomplete Instruction.*—*Harmless Error.*—The giving of an incomplete instruction is not reversible error, where the omission was fully covered by other instructions given. p. 175.

SAME.—*Contradictory Evidence.*—*Instruction.*—Where a witness has made contradictory statements as to material matters in issue, it is proper to instruct the jury that they are the exclusive judges of the credibility of witnesses, and that, in determining the weight to be given to the testimony of such witness, they might take into consideration certain specified matters, and that it was for them to determine what weight they should give to the testimony. pp. 175, 176.

From Adams Circuit Court; *D. D. Heller*, Judge.

Action by Isabelle Botkins against Hiram M. Aspy. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

R. S. Peterson, C. O. France and C. J. Lutz, for appellant.

D. B. Erwin and D. E. Smith, for appellee.

GILLET, J.—Appellee's amended complaint charged appellant, a physician and surgeon, with negligence in the treatment of an injury that appellee had received in and about her right knee. A demurrer to said pleading, on the ground that it failed to state sufficient facts, was overruled, and appellant excepted. On issue joined, there was a trial that resulted in a verdict for appellee. Appellant filed a motion for a new trial, but his motion was overruled, and judgment was rendered for appellee upon the verdict. The assignments of error duly present the questions that we will hereafter discuss.

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Appellant's counsel first present the question as to the sufficiency of the averment in the amended complaint as to appellee's non-contributory negligence. If the nature of the action is such as to bring it within the provisions of the act of February 17, 1899 (Acts 1899, p. 58, §359a Burns 1901), it is not material that appellee has unnecessarily sought to anticipate the defense, as the only contention upon this point is that the pleading does not go far enough sufficiently to charge that the injury of which she complained was occasioned without her contributory fault. The act referred to, so far as it is necessary to set it out, provides: "That hereafter in all actions for damages brought on account of the alleged negligence of any person, copartnership or corporation for causing personal injuries, or the death of any person, it shall not be necessary for the plaintiff in such action to allege or prove the want of contributory negligence on the part of the plaintiff, or on the part of the person for whose injury or death the action may be brought." What is meant by the words, "actions for damages brought on account of the * * * negligence of any person * * * for causing personal injuries?" The phraseology is awkward. Bearing in mind, however, that the title of the act relates to pleadings "in actions for damages for injuries * * * caused by * * * negligence," and that the act is remedial, and designed to change in part a rule of pleading, the correctness of which was originally doubtful, we think that we are justified in construing the act as though the General Assembly had omitted the word "for," as it is used before the word "causing." The subject-matter is actions for negligence resulting in injuries to the person. The cause is the negligence; the effect is the injury. Thus construing the act, it was not necessary that the complaint in question should have anticipated what the statute has made a matter of defense.

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While appellant was upon his case in chief, and one of his attorneys was examining a physician and surgeon called as a witness in his behalf, such attorney made the request that the witness be allowed to examine appellee's right knee in the presence of the jury, that he might testify as to the condition of such knee at that time. Objection was made to the granting of this request, and the court refused so to order. Where the ends of justice require it, it is the duty of the court, upon a timely application, to grant a reasonable request to have the plaintiff in a personal injury case, on the penalty of a nonsuit, submit to a physical examination with reference to the injury he claims to have sustained. *City of South Bend v. Turner*, 156 Ind. 418, 54 L. R. A. 396, 83 Am. St. 200. The right is not, however, coextensive with the power of cross-examination, and some latitude of discretion must be recognized as existing in the trial court. Each case must rest on its own foundation, and the defendant who complains, upon appeal, that the trial court abused its discretion, in refusing to make the order, must be able to present a case where it is plain that the request should have been granted. We are satisfied that error does not appear in the present instance, for the reason, if for no other, that it required the appellee, a woman, to make a *quasi* public exposure of her person. It is true that in this case the appellee subsequently offered to exhibit her limb to the jury, but this did not operate to make the prior ruling improper. In announcing such ruling the court said: "At this present time I will not grant the request." The motion should have been made after appellee offered to expose her limb, to present any question.

On the objection of appellee, the court excluded portions of the testimony of certain physicians and surgeons, called as witnesses by appellant, on the ground that such matters were privileged within the statute. Appellee called on these persons for examination and treatment after the service of appellant was at an end, and it does not even appear

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that he was present or had any knowledge of her purpose to consult them. The case does not fall within the ruling announced in *Lane v. Boicourt*, 128 Ind. 420, 25 Am. St. 442.

While appellant was introducing evidence upon his own behalf, his counsel called appellee to the stand, and asked her whether Dr. McCaskey had taken an x ray photograph or sciagraph of her right knee. Objection was made to the question, and, pending a ruling, by leave of court, appellee's counsel proved by her that whatever Dr. McCaskey had done in relation to her knee had been done in treating her limb. Appellant's counsel thereupon made an offer to prove, which was refused, and an exception taken. In terms, our statute only purports to render the physician or surgeon an incompetent witness as to the matters therein specified, but it is evident that the protection would amount to nothing, in the case of an honest suitor, if the latter could be compelled to make the disclosure. It is well settled in the United States that a party can not be compelled to testify to a communication made by him to his attorney for the purpose of receiving professional advice. *Bigler v. Reyher*, 43 Ind. 112; *Wilson v. Troup*, 7 Johns. Ch. 25; *Carnes v. Platt*, 36 N. Y. Super. Ct. 361; *Hemenway v. Smith*, 28 Vt. 701; *State v. White*, 19 Kan. 445, 27 Am. Rep. 137; Wharton, Evidence (3d ed.), §583. In the case last cited Horton, C. J., speaking for the court, said: "The statute provides that an attorney shall be incompetent to testify concerning communications made to him by his client in that relation, or his advice thereon, without the client's consent. The statute would be of no utility or benefit, if the client could be compelled, against his consent, to make such disclosures. It would be absurd to protect by legislative enactment professional communications, and to leave them unprotected at the examination of the client." Our case of *Bigler v. Reyher*, *supra*, although it related to a communication made to an attorney, rules this case, for

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the legislation is practically the same in both instances. It is hardly necessary to observe that if the consultation was itself protected, a like protection would extend to the mute voucher thereof.

We proceed to the consideration of the instructions given by the court. It is objected that instruction number three, concerning the degree of skill that a person holding himself out to the public as a physician and surgeon should possess, omits to state that he must have a license to practice. This objection does not warrant discussion.

Instruction number seven, by its express terms, related to the injuries on which appellee's action was based, and is therefore not open to the objection that it authorized a recovery, although there was no dislocation of the knee and no injury to the ligaments.

Instruction number nine, relative to the duties of physicians and surgeons, is not objectionable because it omitted to instruct on the subject of contributory fault. The court gave three instructions upon this subject that were tendered by appellant's counsel. Two of these instructions not only dealt with the general proposition, but contained very explicit statements of the duties of the patient, and as to the effect of a neglect to observe such duties. The jury could not have been misled upon the subject of contributory fault.

The objection to instruction number eleven is not well founded. Where a witness has made contradictory statements concerning material matters, it is for the jury to determine whether it will give any weight to his testimony, yet this was the effect of the court's statement, at the close of the instruction, that it was for the jury to determine what weight they would give to the testimony. Counsel for appellant claim that by this instruction the court, in effect, stated to the jury that some weight must be given to the testimony of a witness, although he has been successfully contradicted by his own statements. In the first part of

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said instruction the jurors were told that they were the exclusive judges of the credibility of the witnesses, and the court next stated to the jury that in determining the weight to be given to the testimony of a witness they might consider a number of matters that were pointed out to them. Some of the elements that the court mentioned were elements of weakness in the testimony of a witness and some were elements of strength, but the whole question was left to the jury by the usual statement that they might consider whether such matters existed, and it was after so doing that the court used the language now called in question. We think that the objection is, at most, but a verbal refinement, and in view of instruction number two, given by the court on its own motion, we dismiss the question without further comment.

Instruction number twelve related to the measure of damages. Without extending this opinion to set out or discuss this instruction, we have to say that it is wholly unobjectionable.

There was some evidence upon every material issue tendered by the complaint. We can not disturb the verdict upon the mere weight of evidence. There is no error in the record.

The death of appellee since the submission of this cause has been suggested. Judgment affirmed as of the date of submission.

ALEXANDER v. SPAULDING ET AL.

[No. 19,704. Filed March 10, 1903.]

PLEADING.—*Answer.*—Where the complaint is insufficient, it is immaterial whether the answer is good or bad, since there is no office for an answer to perform until the plaintiff has stated a cause of action against the defendant. *p. 180.*

TRUSTS.—*Suit to Enforce.*—*Implied Trust.*—Where the trust relied upon in a complaint is not alleged to be in writing, it will be presumed that it was in parol, and arises by implication from the facts averred. *p. 180.*

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TRUSTS.—*Implied Trust.*—*Constructive Trust.*—*Complaint.*—The surviving husband of one of decedent's children instituted proceedings against the other children to recover his share of certain real estate. The complaint averred that prior to his death decedent had purchased certain lands and had them deeded, without consideration, to defendants to be held in trust for him; that afterwards he traded the lands for other described lands, and, without consideration, had the deed of conveyance made to defendants, leaving the same a secret trust for himself and his heirs. The complaint did not contain allegations that decedent had furnished the purchase money, and that the deed had been placed in grantees' names without their father's consent; nor was it alleged that defendants purchased the land in violation of a trust, nor that defendants had received the conveyance by agreement, without fraudulent intent. *Held*, that the complaint did not state facts showing an implied trust, within the meaning of §§3396, 3398 Burns 1901. *Held*, also, that the complaint does not state facts amounting to a constructive trust. pp. 180, 181.

APPEAL.—*Insufficient Evidence.*—*Bad Answer.*—Where the plaintiff fails to make out a case in the trial court, he can not complain on appeal that defendant's answer was insufficient. pp. 181, 182.

TRUSTS.—*Money Derived from Sale of Trust Land.*—Where there is no enforceable trust in land, an enforceable trust will not arise in the money derived from the sale of the land. p. 182.

EVIDENCE.—*Will as Evidence.*—In a suit by an heir, where it is sought to show that certain lands held by the other heirs was held in trust for all the heirs of testator, the will of such testator, which tended to support defendants' contention that there was no trust, is admissible in evidence. p. 182.

From Wells Circuit Court; *C. W. Watkins*, Special Judge.

Suit by Marcellus Alexander against Dustan M. Spaulding and another. From a judgment for defendants, plaintiff appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed*.

A. L. Sharpe and *C. E. Sturgis*, for appellant.

J. S. Dailey, *Abram Simmons* and *F. C. Dailey*, for appellees.

HADLEY, C. J.—Suit by appellant to recover money alleged to be held in trust by appellees.

In substance, it is alleged in the complaint that Franklin Spaulding, in February, 1874, died intestate in Wells

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county, Indiana, leaving Dustan and Albert Spaulding (appellees), Laura Alexander, and three other children, his only heirs at law. Appellant, as surviving husband, has, by descent, succeeded to the rights of Laura Alexander; that prior to his death, to wit, in October, 1867, Franklin Spaulding purchased certain described lands in Wells and Blackford counties, "and had the same conveyed to the defendants [appellees] to hold in trust for him. * * *

That afterwards the said Franklin Spaulding traded said lands for other described lands in Blackford county, and had the deed of conveyance made to the defendants [appellees], leaving the same in secret trust to said defendants, for himself, and his heirs aforesaid; that said defendants never paid any consideration for said lands whatever, and the same were the lands of the decedent, and belonged to his estate at the time of his death." Appellees administered upon the estate of their father, and afterwards, to wit, in October, 1875, they sold the lands last described for \$6,400, and received the money; that after the sale appellees paid to each of the heirs of Franklin Spaulding, except the plaintiff (appellant), their distributive shares of the \$6,400; that there is due the plaintiff one-sixth part of the \$6,400; that appellees kept the trust concealed, and appellant learned of it for the first time in 1898, when he immediately demanded his share; that when demanded, appellees denied the trust, and denied that they owed him money on any account. Wherefore, etc. Upon issues joined there was a trial by the court, a special finding of facts and conclusions of law adverse to appellant, and, over his motion for a new trial, judgment was rendered against him for costs. Error is assigned upon the overruling of the demurrer to the fifth paragraph of answer, overruling exceptions to the conclusions of law, and overruling the motion for a new trial.

So far as material to the controlling question in the case, the special finding shows that Franklin Spaulding, the

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ancestor, on June 19, 1866, conveyed to appellee Dustan M. Spaulding, his son, all the property he possessed, both real and personal, the said Franklin at the time of the conveyance being indebted to creditors in the aggregate sum of \$11,150. The consideration of the conveyance was that Dustan was to assume and pay all the said outstanding indebtedness of his father, and to pay to his two sisters (including Laura, the deceased wife of appellant) and to his brother Benjamin each \$1,000, and to his father, \$500 each year during life. At the time of this arrangement and transfer, appellee Albert Spaulding was a minor, and his father further stipulated that if Albert should assist his brother Dustan in the payment of said indebtedness of \$11,150, and in the performance of the other considerations, Dustan should thereupon transfer to Albert an undivided one-half interest in all the property conveyed. After the execution of the above deed Dustan entered into the possession of all the real estate and personal property as his own, and continued thereafter to occupy and farm the real estate, and in 1872 conveyed and transferred an undivided one-half interest in all of said property to his brother Albert (appellee), and the two paid to their two sisters (including Laura) and to their brother Benjamin each \$1,000, and to their father, Franklin, \$500 per annum during the remainder of his life. In 1870 appellees purchased the real estate in controversy for \$5,400, and in part payment thereof conveyed to their grantor a certain sixty-acre tract in Blackford county, owned by them in their own right, for \$3,150, and for the balance of the purchase price executed to their grantor their promissory notes aggregating \$2,250, and which notes appellees subsequently paid with their own money. In 1875 appellees sold the land in controversy for \$6,400.

The conclusion at which we have arrived makes it unnecessary for us to consider the sufficiency of the fifth paragraph of answer.

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The complaint fails to set forth a good cause of action. And there being no sufficient complaint, it is immaterial whether the answer is good or bad, since there is no office for an answer to perform until the plaintiff has stated a cause of action against the defendant. *State, ex rel., v. Emmons*, 88 Ind. 279; *Bowen v. Stricker*, 100 Ind. 45; *Ice v. Ball*, 102 Ind. 42-47; *Louisville, etc., R. Co. v. Badenschate*, 141 Ind. 251, 263; *Carmel Nat. Gas, etc., Co. v. Small*, 150 Ind. 427; *Hiatt v. Town of Darlington*, 152 Ind. 571.

It is averred in the complaint that Franklin Spaulding purchased certain lands, and "had the same conveyed to the defendants to hold in trust for him," and afterward traded said lands for other lands, and "had the deed of conveyance made to the defendants, leaving the same in secret trust to said defendants, for himself and heirs aforesaid; that said defendants never paid any consideration for said lands whatever, and the same were the lands of the decedent and belonged to his estate at the time of his death." The foregoing are the only averments in the complaint relating to a trust of any character. It is not charged that the trust relied upon is in writing, or that it rests upon an agreement, hence we must assume that it was in parol (*Ice v. Ball, supra*; *Noe v. Roll*, 134 Ind. 115), and that whatever trust exists, if any, arises by implication from the facts averred.

Implied trusts under the statute (§§3396, 3398 Burns 1901) are of three kinds: (1) "Where a conveyance is taken in the name of the alienee, without the consent of the party paying the purchase money. (2) Where the alienee, in violation of some trust, has purchased the estate with money not his own. (3) Where, by agreement, the party to whom the conveyance was made, was to hold the land in trust for the party paying the purchase money, or some part thereof." *Noe v. Roll, supra*. The complaint is not good under the first class of implied trusts, because it is not

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alleged that in either the first or second conveyance set forth therein, Franklin Spaulding furnished the purchase money, or that the deed was taken in appellees' names without their father's consent. It is not good under the second class, for failure to aver that appellees purchased the land in violation of some existing trust, or with money belonging to their father. It is likewise insufficient under the third class, for the absence of averment that Franklin Spaulding paid the purchase money, or some part thereof, and that appellees received the conveyance by agreement, without fraudulent intent, to hold the land in trust for their father.

Under the complaint the only other kind of trust that can be thought of is what is known as a constructive trust. The facts alleged do not amount to a constructive trust, because such have their roots in actual or legal fraud, and generally arise in cases where there is no intention to create a trust. *Wright v. Moody*, 116 Ind. 175; *Jackson v. Landers*, 134 Ind. 529; *Orth v. Orth*, 145 Ind. 184, 200, 32 L. R. A. 298, 57 Am. St. 185; *Meredith v. Meredith*, 150 Ind. 299.

No fraud is charged from beginning to end, and no such a state of facts pleaded as calls for the interposition of a court of equity to prevent the failure of justice. The averments, in effect, are that the father purchased land, and had it conveyed to appellees in trust for him, and afterwards traded the first purchase for another tract, and had it conveyed to appellees in secret trust for him and his heirs, from which is implied that the parties attempted, by an undefined and imperfect parol agreement, to create some sort of a trust relation in land, the transaction being such as is denounced by the statute, and a court of equity will not undertake to unravel and enforce by construction.

Another view: Conceding that a trust of some character is well alleged in the complaint, still the quality of the an-

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swer remains unimportant, because the special finding of facts clearly shows that appellant fell far short of proving his complaint or of establishing a trust of any class. The finding is that the land in which it is averred the trust reposed was purchased by appellees, and fully paid for by them, by conveyance to their grantor of sixty acres of other land owned by them and held in their own right, and \$2,250 of their own notes, which they afterwards paid with their own money. The plaintiff having failed to make out a case, the defendant was not called upon for a defense, and it was therefore a matter of no consequence to the plaintiff what quality of answer the defendant had, or whether he had any at all. From the facts specially found the court concluded that the law was with the defendants (appellees), and that they were entitled to judgment for their costs. This was clearly right. There being no enforceable trust in the land, an enforceable trust will not arise in the money derived from a sale of the land.

The record shows that in 1865 Franklin Spaulding, being then the owner of considerable real and personal property, executed his will, bequeathing certain specific legacies to his two daughters (including the said Laura) and to his son Benjamin, and the remainder of all his property to appellees. Five years later he conveyed by deed all his said property, real and personal, to appellees, they agreeing to pay, as the consideration therefor, more than \$11,000 of their father's debts, and to pay him \$500 each year during life, and to their two sisters and brother Benjamin the same amount of money as was bequeathed to them by their father's said will; the lands so conveyed to appellees being the same lands which are alleged to have been impressed with the trust that is here sought to be enforced in the proceeds arising from the sale thereof. Over appellant's objection, the court admitted said will in evidence. The will tended to support appellees' contention that the conveyance to them by their father was a

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bona fide sale, and not the creation of a trust, and was, therefore, competent.

The evidence sustains the findings of fact. We find no error. Judgment affirmed.

STATE, *EX REL.* KEIFER, v. WHEATLEY.

[No. 20,026. Filed March 10, 1903.]

180 183
161 434

OFFICERS.—*Quo Warranto*.—The relator in a *quo warranto* proceeding to remove an incumbent of an office and obtain possession of the office himself, must recover upon the strength of his own right or title thereto and not upon the weakness or infirmities of the respondent's right or title. *p. 188.*

SAME.—*Quo Warranto*.—An information in the nature of a *quo warranto* seeking the removal of an incumbent of a county office and the possession of the office by relator which fails to show that relator has taken the oath of office and given bond as required by law is fatally defective. *p. 189.*

From Tipton Circuit Court; *W. W. Mount*, Judge.

Quo warranto by the State on the relation of John Keifer against David M. Wheatley to remove respondent from the office of county assessor. From a judgment for respondent, relator appeals. *Affirmed.*

M. T. Shiel, J. M. Fippen, J. M. Purvis, G. H. Gifford and *G. J. Gifford*, for appellant.

E. A. Mock and *Dan Waugh*, for appellee.

JORDAN, J.—On December 3, 1900, Keifer, the relator, commenced this proceeding in the lower court by an information, or complaint, in the name of the State, on his own relation, for the purpose of expelling appellee from the office of county assessor, and obtaining the possession thereof of himself. A trial by the court resulted in a finding and judgment in favor of appellee, from which appellant appeals.

The errors assigned relate to the action of the court in overruling the demurrer to the first and second paragraphs of the answer.

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The information consists of two paragraphs. The first, omitting the caption and the jurat, is as follows: "The State of Indiana, on the relation of John Keifer, complains of the defendant David M. Wheatley, and says that the relator was on the 6th day of November, 1892, and has ever since been, a resident freeholder, householder, and elector of the county of Tipton, State of Indiana, and eligible to be elected to and hold the office of county assessor thereof; that on the 6th day of November, 1900, at the general election held in said county for the election, amongst other offices, of county assessor thereof, the relator, the defendant, Fred Findling, and Frank Hayes were the only candidates for said office, and the relator at said election received the highest number of votes for said office and was duly elected thereto for the term of four years from the — day of November, 1900; that the defendant David M. Wheatley is ineligible to hold said office, for the reason that said defendant David M. Wheatley is not a resident freeholder and householder of Tipton county, State of Indiana, at present, and was not a resident freeholder and householder of said county on the 6th day of November, 1900, and was not a resident freeholder and householder of said county for four years before the date of said election; that on the — day November, 1900, the defendant usurped the said office of county assessor, and has since held and received the emoluments thereof, the amount of which is unknown to the relator, and has during said time wrongfully and unlawfully kept the relator out of the possession of said office, and deprived him of said fees and emoluments, to his damage of \$25; that on the 3rd day of December, 1900, before the filing of this complaint, the relator demanded of the defendant the possession of said office and the books and papers belonging thereto, which was refused. Wherefore plaintiff demands judgment for \$25 damages; that the defendant be ousted from said office, and that the relator have possession thereof."

The second paragraph is substantially the same as the first, except that it charges that the defendant was ineligible to be elected to the office, for the reason that he was not a resident freeholder and householder of Tipton county, State of Indiana, at the time of the commencement of the action, and was not a resident freeholder and householder of said county on the 6th day of November, 1900, and was not such freeholder and householder of said county for one year before the date of said election.

A demurrer to each of the paragraphs of the information was overruled, to which the defendant excepted, and thereupon he answered the information or complaint in three paragraphs, among which was the general denial. The first paragraph alleges and shows that the defendant and the relator were opposing candidates for the office of county assessor of Tipton county, Indiana, at the general election held on November 6, 1900. The defendant, it is alleged, received the highest number of votes cast at said election, and also received a majority of the legal votes cast for said office over the relator; that the board of canvassers of said election found, declared, and certified that he had received a majority of eight votes over the relator for the said office of county assessor, and declared him duly elected thereto. It is further shown that within ten days after his said election he duly qualified by executing the bond and taking the official oath required by the law, and thereupon, by virtue of his said election and qualification as aforesaid, he, in good faith, at the beginning of the term for which he was elected, took possession of said office, and has ever since been discharging the duties thereof. It is further alleged that for more than one year next preceding said general election the defendant was an elector of the county of Tipton, and an inhabitant thereof, and so continued to be at the time of entering upon the discharge of the functions of said office. Therefore, it is alleged that he is eligible to hold said office. The second paragraph sets up substantial-

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ly the same facts as the first, with the exception that it avers that the defendant was an elector and resident freeholder and householder of said county for more than four years next preceding said election, and was and is, therefore, eligible to hold said office.

Counsel for appellants insist that the court erred in overruling the demurrer to each of these paragraphs of the answer, for the reason that each discloses that appellee did not possess the qualifications required by the statute creating the office of county assessor.

Section 8530 Burns 1901 provides: "There shall be elected on the first Tuesday after the first Monday in November, 1892, and every four years thereafter in each county in this State, one county assessor, who shall possess the powers and perform the duties hereinafter specified, and no person shall be eligible for election more than twice in any term of twelve years. Such county assessor shall be a resident freeholder and householder of the county not less than four years before the date of such election. Within ten days after election, he shall give bond with two or more good and sufficient freehold sureties, to be approved by the county auditor, in the sum of \$5,000, payable to the State of Indiana, and conditioned for the faithful and impartial discharge of his duties, and shall take and subscribe to an oath or affirmation to be indorsed on his bond that he will faithfully and impartially and honestly discharge the duties of his office."

Counsel for the appellee argue that the first paragraph of answer shows that their client possessed the qualifications required by the State's Constitution in respect to county officers, and that the second paragraph discloses that appellee possessed not only the qualifications exacted by the Constitution, but, in addition thereto, shows that he was a householder and freeholder for the time required by the statute, and their contention is that both the paragraphs of the answer are sufficient in bar of the relator's action.

The argument is advanced that the office in controversy is a county office, and the qualifications essential to render a person eligible to be elected to and to hold the same are prescribed by the Constitution, and can not be varied or enlarged by the legislature. It is contended: (1) That so much of the statute which prescribes that "Such county assessor shall be a resident freeholder and householder of the county not less than four years before the date of such election," is in conflict with §4, article 6, of the Constitution, which provides that: "No person shall be elected or appointed as a county officer who shall not be an elector of the county; nor any one who shall not have been an inhabitant thereof during one year next preceding his appointment;" (2) that it violates §23 of the bill of rights, which prohibits the legislature from granting to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens; (3) that it is invalid because it fixes a property qualification, and provides that a person not an elector may be elected to the office, and is a species of class legislation, which, if upheld, would result in excluding a large portion of the electors of any county from holding the office of county assessor.

Aside from the constitutional question as presented by them, counsel for the appellee contend that the relator is, under the facts averred in his information, not shown to be in a position to complain of the alleged error of the court in overruling his demurrer to the answer, even though the paragraphs in dispute may be bad for the reason that each paragraph of the information is fatally defective in not showing that the relator had qualified as provided by law before he commenced this action, and in giving no excuse for his failure so to qualify. If this latter contention is tenable, then the question of the constitutional validity of the statute in controversy may be dismissed without consideration, for it is elementary and settled by many decisions of this court, that a bad answer is sufficient for a bad

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complaint, and that a defendant may always parry an attack upon the sufficiency of his answer upon that ground.

As a legal proposition it must be manifest that, if the foundation upon which the relator bases his right to prevail in this action is not sufficient for that purpose, he must fail. If he succeeds in ousting appellee from the office in question, and in obtaining the possession thereof himself, he must do so upon the strength of his own title or right thereto, and not upon the weakness or infirmities of appellee's right or title. *Relender v. State, ex rel.*, 149 Ind. 283.

Under the averments of the complaint it would seem that the alleged ineligibility of appellee is not an essential factor to the relator's right of action in this suit, for certainly, under the facts, the pleading does not proceed upon the theory that while appellee, an ineligible candidate, actually received the highest number of votes cast at the election for the office in controversy, nevertheless the relator, an eligible candidate, received at the said election the next highest number of votes cast for said office, and, therefore, in the eye of the law, was properly elected thereto, for the reason that the votes cast for appellee, the ineligible candidate, should not be counted against the relator, as held in *State, ex rel., v. Johnson*, 100 Ind. 489, and cases there cited, and *Vogel v. State, ex rel.*, 107 Ind. 374.

It will be observed that both paragraphs of the information charge that the relator, at the election in dispute, received the highest number of votes cast for said office, and was duly elected thereto for a term of four years from the — day of November, 1900. If he, an eligible candidate for said office, received the highest number of legal votes cast at the election, and became duly qualified by giving the requisite official bond and taking the necessary oath of office, then, under such circumstances, he would be legally entitled at the beginning of the term for which he was elected to take possession of the office and discharge the duties thereof without regard to the question of appellee's ineligibility.

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Appellee, who is shown by the information to be the incumbent of the office, must at least be treated as a *de facto* officer, and, before the relator can legally demand that he be ousted, and that he (the relator) be installed therein in his place and stead, it would certainly appear that, as a matter of good pleading, he should disclose by his complaint at least a *prima facie* right or title on his part to the office, not only by showing his eligibility, and that he had been duly or legally elected, but also that he had duly qualified as the law exacts.

In *Griebel v. State, ex rel.*, 111 Ind. 369, this court said: "An information in the nature of a *quo warranto* is the appropriate remedy for obtaining the possession of an office to which a person has been legally elected, and has become duly qualified to hold."

This action, as shown, was commenced by the relator on December 3, 1900. This date was nearly a month after his alleged election, and also apparently several days after the beginning of the term of office for which he, as claimed, was elected. Not only does the pleading entirely fail to show that he had qualified at the time he demanded the office, or at the time he instituted this action, but it also entirely fails to disclose any excuse or reason whatever for his failure to qualify. Section 4 of article 15 of the State's Constitution provides that: "Every person elected or appointed to office under this Constitution shall, before entering on the duties thereof, take an oath or affirmation to support the Constitution of this State, and of the United States, and also an oath of office." Section 7533 Burns 1901, §5519 Horner 1901, requires that: "Every officer and every deputy, before entering on his official duties, shall take an oath to support the Constitution of the United States and of this State, and that he will faithfully discharge the duties of such office." Section 2131 Burns 1901, §2044 Horner 1901, reads as follows: "Whoever, having been elected or appointed to any office, or being the deputy

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of any officer so elected or appointed, performs any of the duties of such office without having taken and subscribed the oath prescribed by law, or before having given and filed the bond required of him and in the manner prescribed by law, shall be fined not more than \$1,000 nor less than \$10."

In the appeal of *Minnick v. State, ex rel.*, 154 Ind. 379, after referring to these several provisions of the law, this court said: "These provisions of our fundamental and statutory law clearly show that a public official is not authorized to enter upon the discharge of the duties of the office to which he may have been elected or appointed until he has taken the official oath required and given the bond provided for in the event an official bond is also required. The qualification which the law prescribes is, as a general rule, considered a condition precedent which must be complied with in order to constitute the person chosen to fill the office an officer *de jure*. Such person is not in a position to demand possession of the office to which he may have been elected or appointed, or to exercise the functions thereof, until he has qualified as the law exacts. 19 Am. & Eng. Ency. Law, 440; *McVeany v. Mayor, etc.*, 80 N. Y. 185, 36 Am. Rep. 600; *People v. Taylor*, 57 Cal. 620." In addition to the above authorities, see *State, ex rel., v. McCann*, 88 Mo. 386.

It is well settled that to be qualified to take possession of an office, or enter upon the discharge of its duties, means the performance of the acts which the person elected or appointed must, under the law, perform before he can enter upon the discharge of the duties thereof. *State, ex rel., v. Bemenderfer*, 96 Ind. 374.

It certainly can not be denied that the relator's election to the office alone gave him no right to the possession thereof at the beginning of the term for which he was elected unless he had qualified by giving the prescribed bond of \$5,000 and by taking the required oath of office. These

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acts were conditions precedent of his right to the possession of the office. Section 1147 Burns 1901, §1133 Horner 1901, provides that: "The information shall consist of a plain statement of the facts which constitute the grounds of the proceeding, addressed to the court." When filed by any person other than the proper prosecuting attorney against a person usurping an office, the relator in the action must show his interest in the matter. Section 1148 Burns 1901, §1134 Horner 1901. Under the circumstances, therefore, an averment of a fact essential to show fully the relator's interest in the office in controversy or his right to the possession thereof was wholly omitted in the pleading. Whether the information is sufficient in other respects we need not determine, for, in view of the insufficiency urged and pointed out, each of its paragraphs is fatally defective. Therefore the alleged error of the court in overruling the demurrer to the answer need not be considered, for it must be conceded that if the answer is defective or deficient, for the reasons urged by appellant, it is good enough for the latter's bad complaint.

Judgment affirmed.

MASON ET AL. v. MASON.

[No. 20,058. Filed December 12, 1902. Rehearing denied March 10, 1903.]

INSURANCE.—*Change of Beneficiaries.*—*Railroad Relief Association.*—The provision of §5050 Burns 1901 relative to the right to change beneficiaries has no application to an unincorporated railroad relief association. p. 195.

SAME.—*Change of Beneficiaries.*—*Railroad Relief Association.*—The plan of organization of a railroad relief association provided for the payment of fixed death benefits "to the relatives or other beneficiaries specified in the applications of such employees." It also provided that, in certain circumstances, members might apply for insurance in a class wherein higher benefits were paid, the member so applying to sign a supplementary application, and that the applicant might in his application, or subsequently, designate a beneficiary other than relatives. Decedent, a single man, took

160	191
181	529
180	191
183	390
180	191
171	538

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a certificate in favor of his mother. After his marriage he went with his wife to the authorized agent of the association, and surrendered his old certificate and requested that a new certificate be issued to him, in a different class, in favor of his wife. A new certificate was issued and delivered to the wife, but it did not specify the name of the beneficiary. *Held*, that there was no new designation of beneficiary in accordance with the provision of the contract. *pp. 192-202.*

From Superior Court of Allen County; *S. L. Morris*, Special Judge.

Action by Jennie Mason against the Pennsylvania Company and Rachael Mason on a benefit certificate. The company paid the amount of the certificate into court and was discharged, and thereafter judgment was rendered in favor of plaintiff, from which Rachael Mason appeals. Transferred from Appellate Court, under clause 2, §1337j Burns 1901. *Reversed.*

Wilmer Leonard and Elmer Leonard, for appellant.
Henry Colerick, for appellee.

GILLETT, J.—Appellee instituted this action to recover against appellant the Pennsylvania Company on an insurance certificate. Appellant Rachael Mason was also made a party defendant, the complaint alleging that she claimed, but, in fact, had no interest in said certificate. The latter unsuccessfully demurred to the complaint, and upon her demurrer being overruled she reserved an exception to the ruling, and then filed answer. The Pennsylvania Company paid the amount of said certificate into court, and, with the consent of parties, the court entered an order discharging it; and the cause proceeded, under the issues formed between the Masons, to a trial that resulted in a verdict and judgment for appellee. Appellant Rachael Mason appealed to the Appellate Court. Her first assignment of error challenged the ruling of the lower court in overruling her demurrer to the complaint.

The complaint discloses that under a written contract a number of railway companies, including the Pennsylvania

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Company, have for a number of years maintained a relief department, as an unincorporated association; that while the undertaking is joint, to secure greater economy in management, yet the responsibility of each railway company to its employes is several. The contract provides for the creation of a fund, by the ratable contributions of each company and its employes of such sums as shall be necessary to meet the expenses of administration, and to pay such benefits as become due. The instrument also provides that the affairs of the association shall be managed by a joint advisory committee, elected in part, from time to time, by the respective employes of the constituent companies. It is further provided by the contract that the organization and regulations of the association shall be in accordance with an appended plan, and that such plan shall not be changed during the continuance of the agreement, except upon the approval and adoption of the same by all of the companies that are parties to such agreement.

The plan of organization and regulations above referred to provides for the payment of fixed death benefits "to the relatives or other beneficiaries specified in the applications of such employes," for the division of contributing employes into five classes, and that applications for membership are to be in accordance with a prescribed form. This form is to be signed by the proposed member, and it specifies the class to which he seeks admission, and in part reads: "Death benefits shall be payable to (here designate the beneficiary or beneficiaries)." The form of organization also provides that, under certain circumstances, members may apply for insurance in a class where in higher benefits are paid. A member so applying is required by the regulations to sign a supplementary application. This application, it is provided, shall be as follows: "I, * * * by virtue of my former principal application, under and subject to the conditions recited in said

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principal application, and upon the terms thereof, unless, and only so far as herein modified, do hereby make this supplementary application for the following, namely: (here specify the character of benefits applied for)." Regulation No. 28 is as follows: "An applicant may in his application, or subsequently, designate a beneficiary to receive his death benefit, other than relatives entitled to recover the amount payable in the event of the death of the applicant, on giving good and sufficient reasons for the designation." Regulation No. 29 contains the following provision: "Benefits payable on account of the death of a member shall be payable only to the beneficiary or beneficiaries designated in his application to receive the same, if living at the death of said member."

The complaint alleges further that on the 8th day of June, 1898, George W. Mason, a single man, made application for insurance in said relief association, and on the same day received a certificate of membership therein, with a provision in said certificate that in the event of his death the death benefit should be payable to defendant Rachael Mason, his mother; that he subsequently intermarried with the plaintiff, and afterwards he went with his said wife to the authorized agent of said association, and then and there surrendered to him said certificate of membership and a book, containing copies of the contract and regulations above mentioned, that he had received from the association with his former certificate; that he then and there requested that a new certificate of membership be issued to him, in a different class, "and then and there designated his said wife, Jennie Mason, as the beneficiary in case of his death;" that said agent being then and there authorized so to do, issued to said George W. Mason a certificate of membership in said association, numbered 36,917, and a book of like character to the one above mentioned; that said George W. Mason then and there delivered said new certificate and book to his wife, and that at the time of the surrender of

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said old certificate, and at the time of the delivery to him of said new certificate, it was his intention and purpose that said insurance should be for the use and benefit of plaintiff, "And that at the time of the issuing thereof he so named and designated her, to the officer of said company aforesaid, as such beneficiary." The complaint sets out a copy of said certificate No. 36,917. Said instrument does not state the name of the beneficiary, but recites that said George W. Mason is a member of the relief fund of the association, and is entitled to the benefits provided by the regulations of said association (which regulations are annexed to the certificate, and by reference made a part thereof) for a member of the third class, with no additional death benefit of the first class. The further allegations of the complaint are not material to the question in hand.

As the association had no capital stock, but as its members contributed cash to a common fund, out of which benefits were paid, and as the contributing employes, through their representatives, participated in the administration of the association, it was clearly of a mutual character. The provisions of §5050 Burns 1901 relative to the right to change beneficiaries, has no application to this association, as it was unincorporated. *Presbyterian, etc., Fund v. Allen*, 106 Ind. 593. The courts recognize a difference, as to the extent of the right of persons insured to make such changes, between the ordinary insurance contracts and the certificates of mutual companies. As to the latter contracts, the great weight of authority is that in the absence of limitations or restrictions in the rights of a member, imposed by the organic law, the articles, the by-laws, or the certificate, a member may change his beneficiary. *Presbyterian, etc., Fund v. Allen, supra*; *Masonic Mut., etc., Soc. v. Burkhardt*, 110 Ind. 189; *Holland v. Taylor*, 111 Ind. 121; *Milner v. Bowman*, 119 Ind. 448, 5 L. R. A. 95, and cases there cited; *Niblack, Mut. Ben. Soc. (2d ed.)*, §212. Without pausing to grasp the philosophy of the dis-

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inction between the two forms of contract, it suffices to affirm that the cases generally hold that under the latter form of contract the beneficiary has ordinarily no vested interest. But whatever the character of the association, it is obvious that the relations of the insured and the beneficiary to the insurance contract may be made to depend upon the provisions of the contract. To the extent that the contract gives the beneficiary rights, its provisions are a law unto the parties. If there is a right reserved by the insured to change the beneficiary, but if the contract points out the manner in which the change is to be made, then it is the duty of the insured to pursue the contract, if he would displace the beneficiary. *Holland v. Taylor, supra*; *Olmstead v. Masonic Mut. Ben. Soc.*, 37 Kan. 93, 14 Pac. 449; *Renk v. Herrman Lodge*, 2 Dem. Surr. (N. Y.) 409; *Thomas v. Thomas*, 15 N. Y. Supp. 15; *Mellows v. Mellows*, 61 N. H. 137; *Rollins v. McHatton*, 16 Colo. 203, 27 Pac. 254, 25 Am. St. 260; *Supreme Lodge, etc., v. Nairn*, 60 Mich. 44, 26 N. W. 826; *Highland v. Highland*, 109 Ill. 366; *Hotel-Men's, etc., Assn. v. Brown*, 33 Fed. 11.

In *Holland v. Taylor, supra*, the rules of the society provided that a change of beneficiary might be made by the insured by the surrender of the old certificate and the execution of a direction for a change, according to a prescribed form, and it was held that the insured could not make such change by will. In speaking of the relation of the beneficiary to the contract, this court said: "It would be saying too much to say that she had no rights. She was the beneficiary named in the certificate. * * * So long as the contract remained as executed, she had the right of a beneficiary, subject to be defeated by a change of beneficiary by the assured. So long as the certificate remained as executed, the assured had reserved to himself the power to change the beneficiary, and that was the extent of his right in, or power over, the certificate, or the amount agreed to be paid at his death. He had no interest in or to

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either the certificate or the amount agreed to be paid, that would have gone at his death to his personal representatives. By virtue of the by-laws and the certificate, which, as we have seen, constituted the contract between him and the Royal Arcanum, he had power to change the beneficiary. That same contract fixed the mode and manner in which that change might be made; and we think that, taking the by-laws and certificate together, the mode and manner of changing the beneficiary was fixed as definitely, and was as binding upon the assured, as was the right to make such change binding upon the association and the beneficiary. In other words, under the contract, the assured had a right to change the beneficiary, provided he made the change in the manner provided in the contract."

The fundamental law of the society, the articles and the by-laws, are a part of the contract to the same extent as though they were written in the certificate, and persons accepting certificates from mutual insurance associations must take notice of all provisions that constitute parts of the contract. *Holland v. Taylor, supra; Presbyterian, etc., Fund v. Allen, supra.* In the latter case it was said: "The weight of authority, as will appear from an examination of the cases cited, is in favor of the general doctrine that beneficiaries may be changed in cases where policies like the one before us are issued by such associations as the present, and that in this respect such policies are not governed by the general rule which governs ordinary insurance contracts. But granting that this is the general rule, still it can not prevail if the charter of the association prohibits a change in the beneficiary first agreed upon and designated. It is firmly settled that a contract must be made in the mode prescribed by the corporate charter, and must be one authorized by it. *Ohio Ins. Co. v. Nunnemacher*, 15 Ind. 294; *Leonard v. American Ins. Co.*, 97 Ind 299; *Ashbury, etc., Co. v. Riche*, L. R. 7 H. L. 653; *Head v. Providence Ins. Co.*, 2 Cranch 127. Of the provisions

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of the charter and by-laws of the corporation, all who become members are chargeable with knowledge. *Bauer v. Sampson Lodge*, 102 Ind. 262."

The general subject under consideration has been well discussed in the text-book above cited. It is there said: "When a mutual benefit society has, under the powers and within the limits of its charter, provided in its by-laws a particular method of changing a beneficiary, or has set forth in its certificate a way by which the change may be made, no change of beneficiary may be made in any other mode or manner. The reason for this rule is not difficult to discover. It is based upon the familiar maxim that the expression of one thing excludes other and different things. When a society frames a set of rules providing for the distribution of a fund, and for the rights of beneficiaries and members, it must be assumed that it excludes every other mode and manner. Any other conclusion would lead to the most interminable confusion in the law applicable to the distribution of the insurance money, and fritter away, in the expenses of uncertain litigation, funds created for the benefit of widows, orphans and heirs. But there is still another reason. It can not be said that a beneficiary named in a certificate has no rights therein because he has no vested rights. The beneficiary has a right to the proceeds of the certificate of insurance, subject to the right of the member to change the beneficiary according to the terms of the by-laws and regulations of the society, which are a part of the contract of insurance; and the right of the beneficiary to have this contract carried out in the manner provided for is as binding upon the member as his right to change the beneficiary is binding upon the beneficiary and the society." Niblack, *Mut. Ben. Soc.* (2d ed.), §218.

While it is familiar doctrine that a court of equity will, within limits, aid the defective execution of powers, and while we have in this State a precedent, in the case of *Isgrigg v. Schooley*, 125 Ind. 94, where there was the

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element of fraud on the part of the beneficiary, in which this court held that the defective exercise of a power to change a beneficiary would be aided, yet we think that in this class of contracts the jurisdiction should be but sparingly exercised. Insurance of this character is obtained at its approximate cost. Its beneficiaries are usually in necessitous circumstances, and it is of the utmost importance that death benefits should be paid over to beneficiaries under such contracts without delay or great expense. This can not be done by the association with safety if the regulations that it has established, that look to the certain designation of beneficiaries, are to be disregarded. Regulations of this character are not only important to the designated beneficiary and the association, but in their general operation they tend to execute the purpose of the insured. They are therefore to be regarded as matters of substance, and as contractual undertakings that will rarely, if at all, permit of a substitutional method of proof. *Hotel-Men's, etc., Assn. v. Brown*, 33 Fed. 11; *Mellows v. Mellows*, 61 N. H. 137.

In the case last cited the facts were that the rules provided that the fund should go to certain persons, unless otherwise ordered in writing by the insured; such order to be signed by two witnesses and acknowledged before a justice of the peace. The insured left a will, by which he attempted to dispose of the fund. The will was signed by two witnesses, but not acknowledged. In disposing of the case the supreme court of New Hampshire said: "The contract does not expressly allow the power of appointment to be exercised by an order executed in a manner deemed by a court or jury equivalent in utility to the prescribed form. The object of the association is the payment of a certain amount of life insurance after the death of each member; and it may reasonably be inferred that, for a substitutional appointment, a written and acknowledged order, signed by two witnesses, is required, not merely as

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evidence satisfactory to the payer, but as such a protection of each member, and the payees named in the contract, as the law provides for an owner of property and for his heirs, in the execution of a will or codicil. It might be claimed that anything shown by competent evidence to have been regarded by the parties, when they made the contract, as mere matter of form, the law would not treat as matter of substance. But an acknowledgment of a substitutional order before a justice of the peace might in fact be a material safeguard for the member making it, and for the beneficiaries named in the rules and displaced by the order; and the contract does not authorize any tribunal to dispense with any proceeding exacted by the contract as a substantial security of the rights of those parties. If acknowledgment could be omitted as a useless form, there is no ground of law on which two witnesses, or a signed writing, could be required. The will is not such an order as the contract demands."

We agree with counsel for appellee that regulation No. 28 of the association is broad enough to have permitted the insured, with the consent of the association, to have designated appellee as a substituted beneficiary. But this regulation must be construed in connection with the entire contract, and the question arises whether he did designate her in the manner provided by the contract. In this connection it is to be first noted that the original contract provides that the appended plan of organization shall not be changed except upon the approval and adoption of all of the companies that are parties to such agreement. The latter instrument recites, in the statement of the purposes of the organization, that one of such purposes is to pay death benefits "to the relatives or other persons specified in the applications of such employees." The applicant is required in his original written application to designate his beneficiary in case of death. If he enters a higher class, as the

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deceased did, he is required to sign a supplementary application, which shows that he applies by virtue of his former application, and upon the terms thereof, unless, and only so far as, modified in his supplementary application. Regulation No. 29 we have quoted above, and it is unnecessary to repeat it, but its language is most emphatic. That regulation, it will be observed, is couched in the form of a limitation that excludes all but designated beneficiaries. The new certificate that was issued to the insured recites that the latter is entitled to benefits as provided by the regulations annexed to such certificate. The surrender of the first certificate by the insured, and the obtaining of the second certificate, did not amount to a novation. Under the provisions of the regulations, the terms of the second application, and the language of the second certificate, the two transactions were absolutely interlocked. The complaint clearly fails to show a new designation in accordance with the contract. In what manner the husband "designated his said wife, Jennie Mason, as his beneficiary in case of his death," the complaint does not allege, but it is evident that, if he did so, his act was a clear contradiction of the second application that he signed.

When the fact is considered that the benefit was one in which the designated beneficiary had an interest that could not be set aside except by lapsing or a new contract, or a designation in at least substantial compliance with the regulations of the association, it will be at once perceived that the contract is not to be impaired by mere declarations upon the part of the insured as to his desires, or by contemporaneous acts indicative of his intent. For the same reason it follows that the act of the Pennsylvania Company in paying the money into court did not put the appellee in any more advantageous position. While such payment was a waiver of the right of the Pennsylvania Company, it was not a waiver of the right of the designated beneficiary; and,

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besides, it is to be recollected that at the time of such payment whatever right such beneficiary had in the policy had become a vested or property right by the death of the insured.

Judgment reversed, with a direction to the trial court to sustain the demurrer of appellant Rachael Mason to the complaint.

SULZER-VOGT MACHINE COMPANY v. RUSHVILLE WATER COMPANY ET AL.

[No. 20,057. Filed December 11, 1902. Rehearing denied March 10, 1903.]

Mechanic's Lien.—*Notice.*—*Debtor in Failing Circumstances.*—The provision of the act of 1889 (Acts 1889, p. 257, §7255 Burns 1894) making certain claims against debtors in failing circumstances liens without filing notice refers to claims for wages for mechanics and laborers employed in and about any shop, mill, warehouse, store-room or manufactory; and such lien is limited in its operation to this specified class of service, and does not extend to structures other than those designated. *Goodhub v. Hornung's Estate*, 127 Ind. 181, and *Jenckes v. Jenckes*, 145 Ind. 624, overruled. pp. 203-208.

SAME.—*Notice.*—*Last Material Furnished.*—Where the owner had accepted from a subcontractor certain fixtures and machinery placed in a power house as fully completed and had for more than four months been in the possession thereof, the contractor ceased to be the agent of the owner, in the absence of an objection by the latter that the contract had not been completed, to order additional materials that might be made the basis for an extension of the time in which to file a lien for the original work and materials furnished by the subcontractor. p. 208.

From Rush Circuit Court; *L. J. Kirkpatrick*, Special Judge.

Suit by the Sulzer-Vogt Machine Company against the Rushville Water Company and others for the enforcement of a mechanic's lien. From a judgment for defendants, plaintiff appeals. Transferred from Appellate Court, under clause 2, §1387j Burns 1901. *Affirmed.*

J. E. Watson and *Harold Taylor*, for appellant.

C. F. Coffin, for appellees.

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161	604
161	605
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GILLET, J.—Appellant sought to assert and foreclose a mechanic's lien against the property of appellee for money due said appellant, as a subcontractor for the Howe Pump & Engine Company, because of the furnishing, at the latter's request, of boilers, fixtures, etc., for the power-house of appellee. A demurrer was filed by appellant to the second paragraph of appellee's answer, that was addressed to the second paragraph of appellant's cross-complaint. An assignment of error is based on said ruling. We proceed to consider, since the demurrer searched the record, whether said paragraph of cross-complaint stated a cause of action against appellee.

In the decision of this cause by the Appellate Court it appears that said court construed said paragraph of cross-complaint as proceeding on the theory that appellant was entitled to a lien, not because it had given the statutory notice of its intention to hold a lien, but because of the allegations of said paragraph relative to intervening insolvency. It is difficult to stamp a particular theory upon this paragraph, but, after consideration, we have concluded that the view of the Appellate Court was correct.

At the time this action was commenced and said paragraph filed, the mechanic's lien act, approved March 9, 1889 (Acts 1889, p. 257), was in force. Section one of said act provided: "That contractors, subcontractors, mechanics, journeymen, laborers, and all persons performing labor or furnishing material or machinery for erecting, altering, repairing, or removing any house, mill, manufactory, or other building, bridge, reservoir, system of water-works, or other structure, may have a lien separately or jointly upon the house, mill, manufactory, or other building, bridge, reservoir, system of water-works, or other structure which they may have erected, altered, repaired, or removed, or for which they may have furnished material or machinery of any description, and on the interests of the owner of the lot or land on which it stands, or with

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which it is connected, to the extent of the value of any labor done, or material or machinery furnished, or both, and all claims for wages for mechanics and laborers employed in or about any shop, mill, wareroom, storeroom, or manufactory, shall be a first lien upon all the machinery, tools, stock of material or work, finished or unfinished, located in or about such shop, mill, wareroom, storeroom or manufactory or used in the business thereof; and should the person, firm or corporation be in failing circumstances, the above-mentioned claims shall be preferred debts, whether notice of lien be filed or not."

We are required to construe the above statute by determining what class or classes of claims the General Assembly had reference to in the following provision: "And should the person, firm or corporation be in failing circumstances, the above-mentioned claims shall be preferred debts, whether notice of lien be filed or not." It is clear, from the earlier language of this section, that the first class that is given rights by the section are contractors, subcontractors, mechanics, journeymen, laborers, and all persons performing labor or furnishing material or machinery for erecting, altering, repairing, or removing any of the structures included within the meaning of the statute. The persons mentioned may obtain not only a lien upon the structure, but they may also, under the provision of the section quoted and the next succeeding section, obtain a lien upon the real estate upon which the structure is situate. The second class that is given a lien under said first section includes mechanics and laborers employed in or about any shop, mill, wareroom, storeroom, or manufactory, and their lien is confined to the machinery, tools, stock of material, and work, finished or unfinished, located in or about such shop, storeroom or manufactory, or used in the business thereof. The existence of this classification was recognized in *Goodbub v. Estate of Hornung*, 127 Ind. 181; and *McElwaine v. Hosey*, 135 Ind. 481. It will be observed that

these two general classes of persons are not only different in their personnel, but that they are given rights so variant that they could not come in conflict with each other. This, in the absence of other considerations, leads to the presumption, since the provision for a preference is found in the latter part of the section, that the words "the above-mentioned claims" refer only to the last class of claims mentioned in the statute. Moreover, as we look back of the words "the above-mentioned claims," to find their antecedent, we observe that it is only the second class of persons that the statute in words refers to as possessing "claims."

The conclusion that our observations thus far foreshadow is reënforced by the fact that the particular right that is granted in case the person, firm, or corporation is in failing circumstances, is, not the right to a lien *eo nomine*, but to have the "claim" put on the basis of a preferred debt.

In the case of *Goodbub v. Estate of Hornung, supra*, some consideration was given to the meaning of the term "preferred debts," as used in this statute. It was there said: "The preference which the statute thus gives will not entitle the holder of the preferred claim to payment in full out of the general assets of the estate, but it is a specific preference, reaching only the specific fund derived from the property to which the lien would attach. If such fund is sufficient in amount to pay the preferred claims in full, they should be so paid." Assuming the correctness of these statements, it must be evident that the General Assembly did not contemplate any such far-reaching consequences as would result if the claims of contractors and subcontractors, and the persons the statute classes with them, were put on a basis of such high privilege. The persons mentioned have a right of lien that may extend to the interest of the owner in the real estate, but as against the real estate proper it was certainly not the legislative purpose to displace antecedent liens. Such a result would follow if, as held in *Goodbub v. Estate of Hornung, supra*, the extent of the right of pri-

ority were measured by the property to which the lien attaches. It is but reasonable to suppose that it was the intent of the General Assembly to give the first class the right to a lien merely, enforceable to the extent provided by statute, and to confine the lien and priority provided by the latter part of the section to mechanics and laborers. So construed, the language under consideration would be calculated to do nothing more than to provide a fund for the payment of the pay-roll of the persons engaged in the classes of business that the statute refers to, as is eminently just and proper, and would not operate to displace antecedent rights in real property.

In *McElwaine v. Hosey*, 135 Ind. 481, the right view was taken of the construction of the statute under consideration. It was there said: "There is a contention as to whether the labor, for which a recovery is sought in this proceeding, accrued under any of the methods of employment for which the acts of 1889, §1, page 257, create a lien without notice. This is a remedial statute. It is very specific in its terms, and was evidently to secure to the class of wage-earners, known as mechanics and laborers, the fruits of their toil, while employed in or about any shop, mill, wareroom, storeroom, or manufactory, by granting them first liens upon all the machinery, tools, stock or material, or work finished or unfinished, located in or about such shop, mill, wareroom, storeroom, or manufactory, or used in the business thereof; and should the person, firm, or corporation be in failing circumstances, the above-mentioned claims shall be preferred debts, whether notice of lien be filed or not, but this statute, it will be observed, providing a lien, without filing such notice, is limited in its operation to this specified class of service, and does not extend to erections or structures other than those thus designated. If parties desire a lien for other services enumerated in section one, but not embraced in this list, they must file their notice of mechanic's lien in

the recorder's office, as provided by section three of the same act."

The cases of *Goodbub v. Estate of Hornung, supra*, and *Jenckes v. Jenckes*, 145 Ind. 624, can not be entirely reconciled with our view, as expressed in this decision. The Appellate Court correctly declared the rule of law as applicable to the question under consideration, and it would not have been necessary for us to transfer this case but for the fact that our latest case upon the subject is in some measure out of accord with the *McElwaine* case.

It is proper to observe that the sole questions that we have considered have been the respective rights of the two statutory classes of persons under the statute above set out. It is also to be noted that the time in which appellant might have filed a mechanic's lien had expired before the decision of *Jenckes v. Jenckes, supra*.

The rule of *stare decisis* should not be lightly departed from. The common law could not have attained to the dignity of a science if courts of last resort were disposed to disregard precedents. But past errors can not be an excuse for the evasion of present duties, and in a case of this kind, where we feel that, through misapprehension, we have clearly failed correctly to declare the legislative will, we deem it our duty, after a painstaking consideration of the statute, and the course of adjudication under it, to declare the correct interpretation, and to overrule former cases to the extent that they are not in accord therewith.

The consideration is urged upon us that the act of March 8, 1899 (Acts 1899, p. 569, §7255 Burns 1901), was enacted under a presumed knowledge of the interpretation that was given the somewhat similar statute of 1889 by the case of *Jenckes v. Jenckes, supra*. Inasmuch, however, as this suit was commenced, and the particular paragraph of complaint filed, while the act of 1889 was still in force, the remedy of appellant, if any, is to be determined by the former act. *Goodbub v. Estate of Hornung, supra*. In

view of this fact, we leave to future determination the question whether, considering the state of the authorities at the time of the enactment of the statute of 1899, there existed such a settled rule concerning the construction of the earlier act as to create the presumption that the General Assembly enacted the later law with the construction contended for by appellant's counsel stamped upon it. See *Warner v. Texas, etc., R. Co.*, 164 U. S. 418, 17 Sup. Ct. 147, 41 L. Ed. 495; *Willis v. Eastern Trust, etc., Co.*, 169 U. S. 295, 18 Sup. Ct. 347, 42 L. Ed. 752; *Pratt v. Miller*, 109 Mo. 78, 18 S. W. 965, 32 Am. St. 656.

The second paragraph of answer was also a sufficient answer to appellant's first paragraph of cross-complaint, in view of the allegations of said paragraph of cross-complaint. Said paragraph discloses that the notice of intention to hold a lien was not given within the time required by law, except as an item of twelve braces of one and one-quarter round iron, alleged to have been furnished October 2, 1896, be counted as a part of the original contract of construction. The suit is not to recover for said item, as its value is not alleged; but the suit is to recover on a contract to furnish a boiler, fixtures, etc. Before it was competent to foreclose a mechanic's lien against the property for the whole price of work and material furnished because of a small item furnished on the subsequent direction of the principal contractor, facts ought to have been averred showing his continued agency. After the owner had accepted the boiler, fixtures, etc., as fully completed, and had for more than four months been in the possession thereof, the contractor ceased to be the agent of the owner, in the absence of an objection by the latter that the contract had not been completed, to order additional materials that might be made the basis for an extension of the time in which to file a lien for the original work and materials furnished by the subcontractor.

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Appellant was not entitled to a new trial on the ground of surprise, or because of newly discovered evidence. It is apparent that the rulings relative to the admission and rejection of evidence that are complained of could not have affected the result.

The judgment of the lower court is affirmed.

FRANKEL v. GARRARD ET AL.

[No. 20,009. Filed March 11, 1903.]

PLEADING.—Amendment of Complaint.—New Parties Plaintiff.—The amendment of a complaint, by joining another party plaintiff, is proper at any time before answer without leave, and the trial court may in its discretion permit such amendment at any time. *p. 212.*

SAME.—Demurrer.—A demurrer to a complaint for want of sufficient facts calls into question not only the sufficiency of the facts to constitute a cause of action, but the right of plaintiffs to sue jointly. *pp. 210, 212.*

SAME.—Separate Demurrer.—A separate demurrer of a codefendant tests the sufficiency of a complaint as to him, although the demurrer was general in form, and did not contain the limiting words "as to him." *p. 212.*

SAME.—Complaint Not Good as to One Party Joined.—A complaint which is not good as to either of two plaintiffs who join in it, is bad as to both. *p. 213.*

JUDGMENT.—Vacation for Fraud.—Parties.—In a suit to vacate a judgment and to enjoin its enforcement against real estate owned by the judgment debtor at the time the judgment was rendered, a subsequent grantee of the land was a proper party plaintiff. *pp. 213, 214.*

SAME.—Default.—Setting Aside for Fraud.—Injunction.—The act of a plaintiff in causing a false return of summons to be made by an officer is sufficient cause for setting aside the judgment and enjoining its collection. *p. 214.*

SAME.—Default.—Vacation for Fraud.—Collateral Attack.—The impeachment of a judgment by a suit to set it aside and enjoin its collection for fraud is a direct, and not a collateral, attack. *p. 214.*

SAME.—Justice of Peace Judgment.—Setting Aside.—Jurisdiction.—A suit to set aside a justice of the peace judgment, a transcript of which has been filed in the office of the county clerk, is properly brought in the circuit court, since a justice of the peace has no equity jurisdiction. *pp. 214, 215.*

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PLEADING.—Demurrer.—Defect of Parties.—Defect of parties, as a statutory cause for demurrer, means too few, not too many parties. *p. 215.*

SAME.—Demurrer.—Parties.—Misjoinder.—Misjoinder of parties is not a ground of demurrer. *p. 215.*

JUDGMENT.—Assignment.—Rights of Assignee.—The assignee of a judgment takes it subject to all the defenses which could have been urged against it in the hands of the original judgment plaintiff. *p. 215.*

From Delaware Circuit Court; *J. M. Smith*, Special Judge.

Suit by William L. Garrard and another against Jacob Frankel. From a judgment for plaintiffs, defendant appeals. Transferred from Appellate Court, under §1387u Burns 1901. *Affirmed.*

J. F. Meredith, for appellant.

J. W. Ryan, *W. A. Thompson* and *R. C. Griffith*, for appellees.

DOWLING, J.—Suit by the appellees, Garrard and Ault, in the Delaware Circuit Court, to enjoin the collection of a judgment rendered by a justice of the peace in favor of one Smith, and against the appellee Ault. The action was originally brought by Garrard alone, but subsequently, with the leave of the court, Ault was joined as a plaintiff. A motion was made by the appellant to strike the name of Ault from the complaint, for the reason that he was "made a party plaintiff without a proper showing, and without any order of court." A demurrer to the complaint stated as grounds therefor: (1) The want of sufficient facts to constitute a cause of action; (2) a defect of parties plaintiff, in that Ault had been improperly added as a plaintiff; (3) a misjoinder of parties plaintiff, in "that Ault had been joined as a plaintiff without an order or leave of the court." The court denied the motion to strike out the name of Ault, and overruled appellant's demurrer to the complaint. Appellant then filed an answer in two paragraphs,

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to the second of which a demurrer was sustained. These rulings are assigned for error.

It appears from the complaint that Smith brought suit against Ault before a justice upon two promissory notes, each for the sum of \$50, payable to Smith; that, when the action was commenced, Ault was not, and for three months before that had not been, a resident of Delaware county, or of the State of Indiana, but that he then was, and for three months had been, a resident of the state of Pennsylvania; that these facts were known to the plaintiff Smith, and to the constable to whom the writ of summons for Ault had been issued; that Smith, with the intent to cheat and defraud Ault, wrongfully caused and procured the said constable to make a return upon the said writ that he had served the same upon Ault by leaving a copy thereof at his last and usual place of residence in said county; that upon the return day of said summons the justice of the peace proceeded to hear and determine said cause in the absence of Ault and without his knowledge, and, upon such hearing, rendered a judgment on said notes against said Ault for the amount of the principal and interest thereof, with attorney's fees; that at the request of Smith the justice prepared a transcript of the said judgment and proceedings, and filed the same in the office of the clerk of the Delaware Circuit Court; that, at the time of the filing of the said transcript, Ault was the owner of lot three, in block four in Goshorn and Lupton's subdivision of the Walling tract, in the city of Muncie, in said Delaware county, and that, upon the filing of the said transcript in said clerk's office, said judgment became an apparent lien on said real estate; that afterwards the said Ault sold and conveyed the said lot to the said Garrard by deed of general warranty; that Smith afterwards sold and assigned said judgment to the appellant Frankel, who caused an execution to be issued to the sheriff of said county, and was

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about to enforce the collection of said judgment by levy upon and sale of the said real estate. The relief demanded was that the judgment be declared void, and that Smith, Frankel, and the sheriff holding the execution be enjoined from enforcing the said judgment against Garrard and Ault, or against either of them.

The sole ground of the motion to strike Ault's name from the complaint was that he was made a party plaintiff without a proper showing or order of court. The court did not err in overruling this motion. The record expressly recites that Garrard, the plaintiff below, asked and obtained the leave of the court to make Ault a party. It appears, also, that the amendment by which Ault was joined as a party plaintiff was made before any answer was filed by the defendants. An amendment at that time could be made as of course, and without leave. §397 Burns 1901, §394 R. S. 1881 and Horner 1901. Besides, the statute, in so many words, authorizes the court at any time, in its discretion, to direct the name of any party to be added; and such order might have been made by the court without request, and in the absence of any formal showing of the reasons therefor. §399 Burns 1901, §396 R. S. 1881 and Horner 1901.

The question of the sufficiency of the facts stated in the complaint as a cause of action, and also of the right of the plaintiffs to sue jointly, was presented by the first ground of the demurrer. *Pence v. Aughe*, 101 Ind. 317; *Sinker v. Floyd*, 104 Ind. 291; *Louisville, etc., R. Co. v. Lohges*, 6 Ind. App. 288.

The separate demurrer of the appellant tested the sufficiency of the complaint as to him, although it alleged generally that the pleading did not state facts sufficient to constitute a cause of action, without the words "as to him." Such a demurrer must be understood as assailing the sufficiency of the complaint, on behalf of the demurring party,

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in the same manner, and with the same effect as if he were the sole defendant.

Counsel for appellant earnestly insist that even if the complaint was sufficient as to Ault, the person against whom the judgment sought to be enjoined was rendered, it was not good as to Garrard, the purchaser of the real estate affected by the lien of the judgment, and the case of *Hogg v. Link*, 90 Ind. 346, is referred to in support of this position. It is further objected that if the complaint is not good as to either one of the plaintiffs who join in it the pleading is bad as to both. The latter proposition is true, and is sustained by numerous decisions of this court. *Brown v. Critchell*, 110 Ind. 31; *McIntosh v. Zaring*, 150 Ind. 301; *Brunson v. Henry*, 140 Ind. 455.

We are of the opinion, however, that the complaint was sufficient as to each of the plaintiffs. The fact that Ault, the judgment defendant, was a party to the action to set aside and enjoin the collection of the judgment, distinguishes the case from *Hogg v. Link*, *supra*. It has been held in this State that the grantor of real estate with covenants has such an interest in restraining a sale of land under a judgment against a former owner, alleged to have been paid, as to make him a proper party to apply for an injunction. *McCulloch v. Hollingsworth*, 27 Ind. 115; *City of Hartford v. Chipman*, 21 Conn. 488; *Redwine v. Brown*, 10 Ga. 311; *High, Injunctions* (3d ed.), §145. And in California, the court decided that the purchaser of lands could restrain their sale under a judgment obtained by fraud against his grantor upon showing affirmatively that he would be injured thereby. *Marriner v. Smith*, 27 Cal. 649.

The right of Ault, the original judgment defendant, to maintain an action to cancel the judgment, is not questioned. By his suit to annul it he unmistakably indicated that he did not acquiesce in the alleged injury, or waive his legal objections thereto. His complaint disclosed facts

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which, if true, rendered it void for fraud. Pending Ault's suit to vacate and annul the judgment, Garrard, his grantee, had the right, at least, to demand an injunction suspending the sale of the real estate purchased by him until the merits of Ault's suit should be determined, and for this purpose we think he was properly joined with Ault as a plaintiff. *Home Ins. Co. v. Gilman*, 112 Ind. 7, 9; *Tate v. Ohio, etc., R. Co.*, 10 Ind. 174, 71 Am. Dec. 309. The material facts of the complaint were, as we have stated, that the assignor of the appellant sued Ault before a justice of the peace of Delaware county; that Ault was not a resident of Indiana, but that he resided in the state of Pennsylvania; that Smith, with knowledge that Ault was not a resident of Indiana, with the intent to cheat and defraud him, wrongfully caused and procured the constable holding the summons for Ault to make a false return upon it, showing that he had served the writ upon Ault by leaving a copy of it at his last and usual place of residence; that the cause was tried by the justice in the absence of Ault, and without his knowledge; and that the judgment was rendered upon the faith of the false return. The demurrer to the complaint admits these allegations to be true, so far as they are well pleaded. The act of Smith in causing the false return to be made was a fraud both upon Ault and the court in which the suit was pending, and, as such fraud, was a sufficient cause for setting the judgment aside and enjoining its collection. *Brake v. Payne*, 137 Ind. 479; *Asbury v. Frisz*, 148 Ind. 513; *Earle v. Earle*, 91 Ind. 27; *Thompson v. McCorkle*, 136 Ind. 484, 492, 493, 43 Am. St. 334; *State v. Hindman*, 159 Ind. 586.

The impeachment of the judgment by an action to set it aside and enjoin its collection for fraud in its procurement was a direct, and not a collateral, attack. *State v. Hindman*, *supra*, and authorities cited.

As the justice by whom the judgment was rendered had no equity jurisdiction, and could grant no relief to the

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parties affected by the judgment, the suit was properly brought in the Delaware Circuit Court. *Brown v. Goble*, 97 Ind. 86; *Cain v. Goda*, 84 Ind. 209; *Nealis v. Dicks*, 72 Ind. 374; *Earle v. Earle*, *supra*; *Johnson v. Ramsay*, 91 Ind. 189; *Brickley v. Heilbruner*, 7 Ind. 488; *Penrose v. McKinzie*, 116 Ind. 35. Although regular upon its face, yet as soon as the fraud by which it was procured was shown in a proper proceeding, between proper parties, the judgment became a nullity. *Hogg v. Link*, 90 Ind. 346, and cases above cited.

The remaining grounds of demurrer to the complaint were an alleged defect of parties plaintiff, and a misjoinder of such parties. The question attempted to be raised is upon the joinder of Ault with Garrard as a plaintiff. We have already decided that Ault was a proper party. The demurrer, however, presents no question concerning the joinder of Ault which we could consider. A defect of parties, as a statutory cause of demurrer, has always been construed to mean that too few parties had been made, not too many. §341 Burns 1901, §338 R. S. 1881 and Horner 1901; *Bennett v. Preston*, 17 Ind. 291; *Hill v. Marsh*, 46 Ind. 218. Misjoinder of parties is not a ground of demurrer. *Redelsheimer v. Miller*, 107 Ind. 485; *Armstrong v. Dunn*, 143 Ind. 433.

The facts stated in the answer of the appellant related only to the apparent regularity of the judgment, and that pleading seemed to assume that, although Smith might have been enjoined from collecting the judgment, his assignee could not. In this the appellant was in error. As such assignee, he took the judgment subject to all defenses which could have been urged against it in the hands of the original judgment plaintiff; and, if void as to him, it was void or voidable in the hands of the appellant. The answer showed no unreasonable delay on the part of Ault in bringing suit to set the judgment aside, and the facts stated by it were not sufficient to constitute an estoppel. The demurrer to the

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answer was properly sustained. *Eagle v. Ross*, 67 Ind. 110; *Potter v. Smith*, 36 Ind. 231, 236; *Scherer v. Ingerman*, 110 Ind. 428, 433.

Finding no error in the record, the judgment is affirmed.

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[No. 19,966. Filed March 11, 1908.]

MUNICIPAL CORPORATIONS.—Creation of New Wards.—Appointment of Councilmen.—The common council of a city is authorized to appoint councilmen for newly created city wards under §3484 Burns 1901, which provides that all vacancies in the office of mayor, clerk, or councilmen in any incorporated city occurring in any manner shall be filled by the common council. *p. 218.*

SAME.—Redistricting.—Ordinance.—Publication.—Section §471 Burns 1901 does not require the publication of notice prior to the adoption of an ordinance redistricting a city into wards, and the operation of the ordinance is not postponed until after the time fixed for publication has expired. *p. 218.*

EQUITY.—Jurisdiction.—Title to Office.—Courts of equity will not interfere to determine questions concerning the appointment or election of public officers or their title to office. *p. 218.*

SAME.—Officers De Facto.—Injunction.—An injunction will not lie to restrain appointees from acting as members of a common council of a city, pending a contest as to title, where the appointees had back of them an ordinance purporting to establish a new ward, which if valid, would result in vacancies in the common council, and were armed with certificates of appointment from the proper appointing power, had qualified, and had been acting as members of the common council for months before their right to do so was called in question by such proceeding. *pp. 219-222.*

INJUNCTION.—Private Person.—Public Right.—A private person can not maintain an injunction for the invasion of a public right, where the complaint fails to show a special injury to the complainant. *p. 222.*

SAME.—Municipal Corporations.—Suit by Members of Common Council.—Individual members of a city council can not maintain an injunction for the protection of public rights. *pp. 221, 222.*

SAME.—Complaint.—Affidavits.—Affidavits can only be considered as evidence of allegations made in a complaint for injunction, and can not be regarded as laying the foundation for equities not otherwise claimed. *p. 223.*

From Putnam Circuit Court; *P. O. Colliver*, Judge.

160	216
160	488
160	216
161	250
162	577
160	216
163	20

160	216
171	282

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Injunction proceeding by Edward McG. Walls and others against Frank L. Landes and another. From an interlocutory order granting a temporary injunction, defendants appeal. *Reversed.*

S. A. Hays, B. F. Corwin, B. K. Elliott, W. F. Elliott and F. L. Littleton, for appellants.

H. H. Mathias and G. A. Knight, for appellees.

GILLET, J.—Appellees, three in number, insituted this action to restrain appellants from acting as members of the common council of the city of Greencastle until the determination of an action, by way of information, instituted in the name of the State, on the relation of the prosecuting attorney, in which the right of appellants so to act was drawn in question. On motion of appellees, a temporary injunction was granted. Appellants reserved an exception, and from said interlocutory decree they appeal to this court.

It is unnecessary to set out even a synopsis of the entire complaint. It discloses that on the 13th day of May, 1902, the common council of said city attempted to enact an ordinance providing, among other things, for the redistricting of said city for ward purposes, and that subsequently, but at the same meeting, the common council, by resolution, attempted to appoint appellants as members of such common council to fill two vacancies that said ordinance purported to create. The complaint sets out numerous matters that it is claimed were irregular in the enactment of said ordinance. It is disclosed that appellants immediately qualified upon the making of said pretended appointment, and that at the time of the filing of the complaint in this case, September 1, 1902, they were acting as members of said common council, and had been since their pretended appointment. The complaint also discloses that appellees are, and had been since a date prior to said 13th day of May, 1902, among the duly elected, qualified, and acting

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members of said common council, and that appellees did not vote for the enactment of said ordinance or the adoption of said resolution. Appellees charge that appellants are usurping the functions of the members of said common council; and it is further alleged, in effect, that, if the appellants are not restrained, they will unite with the members of the common council who voted for them in the passage and adoption of certain measures to the injury of the public.

No question is made as to the power of the common council to adopt an ordinance providing for the redistricting of the city for ward purposes. See §3470 Burns 1901. The objections that are here made, in so far as they pertain to the ordinance, relate to certain matters of parliamentary law.

There is no question either, that is worthy of serious consideration, as to the power of the common council to fill a vacancy so created. §3484 Burns 1901; *State v. Gorby*, 122 Ind. 17. Under §3476 Burns 1901, it is clear that it is contemplated that each ward shall have two councilmen, and it would, therefore, follow, with a general power of appointment vested in the common council, in the absence of any restrictive provision, that whenever a new ward comes into existence the common council should fill the vacancies thereby created. Section 3471 Burns 1901 does not require a publication of notice prior to the adoption of the ordinance, and the operation of the ordinance is not postponed until after the time fixed for publication has expired.

Assuming the power of the common council to enact such an ordinance and the power to fill the incidental vacancies that may be so created, and we are far within established doctrine in asserting that appellees should not have been granted an injunction. The authorities clearly establish that courts of equity will not interfere to determine questions concerning the appointment or election of public officers or their title to office. *Markle v. Wright*, 13 Ind.

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548; *Muhler v. Hedekin*, 119 Ind. 481; *Ex parte Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402; *White v. Berry*, 171 U. S. 366, 18 Sup. Ct. 917, 43 L. Ed. 199; *Green v. Mills*, 16 C. C. A. 516, 69 Fed. 852, 30 L. R. A. 90 (opinion by Chief Justice Fuller); *Tappan v. Gray*, 9 Paige 507, 7 Hill 259; *People, ex rel., v. Draper*, 24 Barb. 265; *Hagner v. Heyberger*, 7 Watts & Serg. 104, 42 Am. Dec. 220; *Appeal of Gilroy*, 100 Pa. St. 5; *Beebe v. Robinson*, 52 Ala. 66; *Kilpatrick v. Smith*, 77 Va. 347; *Coleman v. Glenn*, 103 Ga. 458, 30 S. E. 297, 68 Am. St. 108; *Patterson v. Hubbs*, 65 N. C. 119; *Delahanty v. Warner*, 75 Ill. 185, 20 Am. Rep. 237; *Sheridan v. Colvin*, 78 Ill. 237; *Neeland v. State, ex rel.*, 39 Kan. 154, 18 Pac. 165; High, Injunctions (3d ed.), §§1312, 1313, and see *Parmater v. State, ex rel.*, 102 Ind. 90. Various reasons have been assigned for the rule,—as the existence of an adequate remedy at law, the non-concern of equity with matters of a political nature, and the impolicy of interfering with a *de facto* officer pending a contest as to his title.

Appellees' counsel contend, however, that this is not a case of a contest; that the complaint shows that the offices have not been created that appellants respectively claim to hold. We realize that there ought to be some distinction made between cases where the rights of third persons depend upon the validity of the acts of a person in possession and exercising the functions of an office and cases where the right of the latter to hold the office is drawn in question. There are a number of authorities which uphold the right of a court of equity to interfere on behalf of an officer *de facto*, claiming to be the officer *de jure*, to prevent another, especially an intruder, from wresting the office from him without process of law. *City of Huntington v. Cash*, 149 Ind. 255; *Parsons v. Durand*, 150 Ind. 203; *Braidly v. Theritt*, 17 Kan. 468; *Guillotte v. Poincy*, 41 La. Ann. 333, 6 South. 507, 5 L. R. A. 403; *State, ex rel., v. Superior Court*, 17 Wash. 12, 48 Pac. 741, 61 Am. St. 893;

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Palmer v. Foley, 45 How. Pr. 110. We need not pause to consider the basis on which these cases rest, for they go no further than to announce the authority of equity to maintain, without determining the title, the *prima facie* legal status of the situation until the question of title can be determined in the usual mode and by the appropriate tribunal. This proposition itself works the destruction of appellees' claim to an injunction on their own behalf, for appellants had back of them an ordinance purporting to establish a new ward, which, if valid, would result in vacancies in the common council, and were armed with certificates from the proper appointing power, had qualified, and had been acting as members of the common council for months before their right to do so was drawn in question by this proceeding. There can be no doubt as to what was the *prima facie* legal status of the situation at the time this action was brought.

An examination of some of the cases last cited will be instructive in this connection. *Braidy v. Theritt*, *supra*, states that the officer *de facto* is the proper person to hold the office pending a contest therefor. It is said in *Guillotte v. Poincy*, *supra*, where the defendant was out of possession, that "The plaintiff was entitled to relief by injunction in order to preserve the *status quo* until the right shall be judicially determined, which is the extent to which the injunction should go." In the case of *State, ex rel., v. Superior Court*, *supra*, it was affirmed that "One in possession of an office by virtue of a certificate of election issued by the proper officer and regular upon its face is entitled to retain possession and perform the duties of the office without interference until such certificate is set aside in some appropriate procedure." The following is an extract from the opinion in *Palmer v. Foley*, *supra*: "Jurisdiction ought not to be assumed to oust an officer from an office held under the color of title 'until his right to such office has been settled in the mode prescribed by law.' Walter B. Palmer received

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his appointment as deputy chamberlain from the chamberlain, who assumed, at least, to possess the power to make the appointment. He took possession of the office and has since discharged its duties. This gave him sufficient color of title to constitute him the *de facto* deputy, entitling him to hold the office until ousted by the judgment of the court. *Parker v. Baker*, 8 Paige 428. And being in possession he is presumed to hold *de jure* also."

We do not think that the case of *Kerr v. Trego*, 47 Pa. St. 292, that is relied on by counsel for appellees, affords them any real support. That was an extraordinary case, resting on an unusually broad grant of power. The case seems to belong in the class of cases we have just been considering. The general doctrines announced in the course of this opinion seem to have been held in Pennsylvania both before and since that decision. We can not consent to follow it, however, if it goes as far as counsel contend. New cases may illustrate or enlarge the operation of the principles on which courts of equity act, but the courts are not at liberty to depart from those principles. Story, Eq. Jurisp., §§10-20; *State, ex rel., v. Cunningham*, 83 Wis. 90, 53 N. W. 35, 35 Am. St. 27, 17 L. R. A. 145; High, *Injunctions* (3d ed.), §7. Appellees were not entitled to an injunction in their own right.

The further claim advanced on behalf of appellees, that they were entitled to maintain an injunction on behalf of the public, is also destitute of merit. Some of the distinctively prerogative writs of the common law—as *habeas corpus* and *mandamus*—that issued originally on motion showing probable cause for invoking the extraordinary power of the crown to assist the party (3 Blackstone, Comm., 132), have become to a large extent writs of right. High, *Extra. Leg. Rem.*, §431; *Hamilton v. State, ex rel.*, 3 Ind. 452; *Board, etc., v. State, ex rel.*, 86 Ind. 8; *Union Pac. R. Co. v. Hall*, 91 U. S. 343, 23 L. Ed. 428. On the other hand, while the writ of injunction has been used to a

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limited extent to protect public rights, yet as to rights that immediately affected the public, the bill or information has always been exhibited by one who strictly represented the public. In such cases the practice in England warranted the joining of a relator as an act of favor on the part of the Crown, that there might be a person responsible for costs; and where an individual had a special interest in the suit it was permissible to join his personal complaint with the information, the two forming together an information and bill. Mitford & Tyler, Pl. & Pr. in Eq., 118, 119; Adams, Equity (8th ed.), *301. The authorities, however, without exception, both in England and America, deny to a private person an injunction for an invasion of the public right where the bill or complaint fails to show a special injury to the complainant. 4 Blackstone, Comm., 167; *McCowan v. Whitesides*, 31 Ind. 235; *Cummins v. City of Seymour*, 79 Ind. 491, 41 Am. Rep. 618; *Indiana, etc., R. Co. v. Eberle*, 110 Ind. 541, 59 Am. Rep. 225; *Manufacturers Gas, etc., Co. v. Indiana Nat. Gas, etc., Co.*, 155 Ind. 566, 50 L. R. A. 768; *Doolittle v. Supervisors*, 18 N. Y. 155; *People, ex rel., v. Stevens*, 5 Hill 616; *State, ex rel., v. Lord*, 28 Ore. 498, 43 Pac. 471, 31 L. R. A. 473; *State v. Cunningham*, 83 Wis. 90, 53 N. W. 35, 35 Am. St. 27, 17 L. R. A. 145. Equity has no writs that may be said to found jurisdiction. Its processes are remedial, and the bill or complaint must on its face disclose a case for equitable intervention. Story, Eq. Pl. (10th ed.), §10; High, Injunctions (3d ed.), §7; *State, ex rel., v. Lord, supra*; *State v. Cunningham, supra*. The appellees are not the city, and, outside of their official duties as outlined by statute, they in nowise represent it. The allegations as to a probable injury to the inhabitants of the city in general add no strength to the complaint. *Farris v. Jones*, 112 Ind. 498, 503.

We need not determine whether the bill of exceptions is in the record. If the complaint failed to state a cause of

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action for an injunction, interlocutory or final, the motion for a temporary injunction should have been denied. Affidavits are only to be considered as evidence of allegations made in the complaint, and can not be regarded as laying the foundation for equities not otherwise claimed. Kerr, Injunctions, *612. See *Clark v. Town of Noblesville*, 44 Ind. 83.

Judgment reversed, with an instruction to the court below to dissolve the temporary injunction.

SMITH ET AL. v. BORDEN.

[No. 20,022. Filed March 12, 1903.]

APPEAL AND ERROR.—Record.—Assignment of Error.—Where the record on appeal discloses that plaintiffs demurred separately and severally to the second, third, and fourth paragraphs of answer, and that the demurrer was overruled as to the second and fourth but is entirely silent in respect to the ruling on the third paragraph, an assignment that the court erred in overruling the demurrer to the second, third, and fourth paragraphs of answer presents no question for decision. p. 224.

SAME.—Motions.—Record.—A motion to strike out which is not made a part of the record by bill of exception or order of court can not be considered on appeal. p. 225.

SAME.—Waiver.—Questions not discussed are waived. p. 225.

SALES.—Warranty.—Breach.—Pleading.—An answer to a complaint in an action on a promissory note given for the purchase money of a windmill alleged that plaintiffs expressly represented the windmill to be of such a quality, character, and capacity that under the force of a moderate wind it would grind from twenty to thirty bushels of grain per hour, and under a very light wind would pump an abundance of water; that defendant was ignorant in respect to its qualities and merits and believed the representations to be true, and was induced thereby to purchase the same; that it was not of the quality, character, or capacity as represented, and neither performed, nor was it capable of performing, the work which plaintiffs represented it would do; that it was worthless for any of the purposes for which it was sold, and wholly worthless to defendant for any purpose; that defendant repeatedly notified plaintiffs of its worthless condition and failure to operate and requested them to remove it from his premises, and still offers

180	223
165	381
180	223
167	541

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to permit them to remove it from his premises. *Held*, that the answer pleaded a warranty of the property sold, and a breach thereof, and states facts sufficient to bar the action on the note. *pp. 225-232.*

From DeKalb Circuit Court; *E. D. Hartman*, Judge.

Action by Kirk A. Smith and others against Reuben A. Borden on a promissory note. From a judgment for defendant, plaintiffs appeal. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

Willis Rhoads, for appellants.

R. W. McBride, C. S. Denny and J. W. Baxter, for appellee.

JORDAN, J.—Action by appellants to recover of appellee on a promissory note executed by him for the sum of \$240. Answer in four paragraphs. Reply thereto. On the issues joined there was a trial by jury, and a verdict returned in favor of the defendant—appellee herein—and over the plaintiffs' motion for a new trial judgment was rendered that the defendant recover costs of the plaintiffs, and the latter were awarded, by the judgment, a return of the property sold by them to the defendant.

Appellants rely for a reversal on the assignments that the court erred: (1) In overruling their demurrer to the second, third, and fourth paragraphs of the answer, the latter paragraph being in the nature of a counterclaim; (2) in denying their motion to strike out and reject said third paragraph.

While the record discloses that appellants demurred separately and severally, for insufficiency of facts, to each of these paragraphs of answer, nevertheless it discloses only that the demurrer was overruled as to the second and fourth, but is entirely silent in respect to the ruling thereon in regard to the third paragraph; hence we are not apprised as to the ruling thereon in respect to said paragraph. Under the circumstances, therefore, there is no ruling or decision of the lower court upon which appellants can

properly predicate their second assignment of error, and it must follow that the questions which they seek to present for our consideration under that assignment can not be considered.

The alleged error of the court in denying the motion to strike out and reject the third paragraph of the answer must be dismissed, without consideration, for two reasons: (1) The motion has not been made a part of the record by a bill of exceptions, or by order of court; (2) counsel for appellants have virtually failed to present any argument to establish the fact that in denying the motion the court committed an error.

The first paragraph of the answer admits the execution of the note in suit, but alleges that it was executed by the defendant without any consideration whatever. The second also admits its execution, but avers that it was executed for no other or different consideration than the purchase price of a wind-wheel, and the attachments thereto, sold by the plaintiffs to the defendant for the particular purpose of furnishing power to pump water and to grind grain for domestic use, in order to supply the stock on defendant's farm with food and water. It is shown that the plaintiffs at the time they sold said wheel to the defendant represented and stated to him that the wheel, together with the attachments connected therewith and belonging thereto, was in perfect condition for the purposes for which it was sold, and was especially adapted to perform such work; that the wheel and its attachments, when put up and connected together, would constitute a first-class and complete machine to grind grain and pump water sufficient to supply water and food for stock; that it was a machine of such quality and character that under the force of a moderate wind it was capable of furnishing power to grind from twenty to thirty bushels of grain for stock food each and every hour it was operated; that with a very light wind in a short time the machine could and would pump

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an abundance of water, sufficient for all of the needs of the defendant, and that it was a first-class machine for the aforesaid uses and purposes. It is further shown that the defendant, at the time he purchased the wheel or machine of the plaintiffs, was ignorant of the character or nature of such machines, and especially was he ignorant of the merits and qualities of the one in question. He believed the aforesaid representations and statements made by the plaintiffs in regard to this machine, and relied upon them as true, and was thereby induced to purchase said wheel or machine from plaintiffs, and permit them to deliver it to him, and to execute the note in suit for \$240, the purchase price thereof. Facts are alleged which go to negative the representations and statements as made by the plaintiffs in respect to the wheel, and it is disclosed that when the machine was put in operation it did not conform to or satisfy the aforesaid representations and statements made by the plaintiffs in regard thereto; that it was not first-class and complete for any of the aforesaid purposes for which it was sold to the defendant. After the plaintiffs had placed or erected it on defendant's premises, it failed to operate so as to pump water for stock or for any other purpose. Under the force of a very hard and strong wind it pumped only a very small stream or quantity of water, not sufficient to furnish the defendant's stock with water; that under the force of a moderate wind it failed to grind twenty to thirty bushels of grain per hour, as the plaintiffs had stated and represented it would, but required the force of a very high and strong wind to enable it to grind from one to two bushels of grain per hour. It is averred that the machine is wholly worthless for any of the aforesaid purposes for which it was sold to the defendant, and that it is utterly worthless to him for any purpose, and that he has frequently notified the plaintiffs of its worthless character and condition. On several different occasions plaintiffs sent their agents and employees to repair or adjust the wheel

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in order to make it perform the work which they had represented and stated to defendant it would perform, but each time they wholly failed to make the machine do the work which they had represented it would perform, and each time left it with the defendant in a worthless condition. Thereupon the defendant notified plaintiffs to take, detach, and remove said wheel, together with all of its attachments, from his premises, and in the pleading in question he continues to make the offer to return the machine to the plaintiffs, and requests that they take possession thereof and remove it from his premises. Wherefore it is averred that the consideration of the note in suit has failed, and he prays judgment for costs.

Counsel for appellants contend that the facts, as averred in this paragraph, are neither sufficient to establish a warranty nor such a breach thereof as show an entire failure of the consideration of the note in suit. It is claimed that the answer is neither sufficient to defeat a recovery on the note, upon the ground that there was a warranty of the machine in question, nor upon the ground of fraud in the sale thereof. In the latter contention—that the paragraph is not sufficient on the grounds of fraud—we fully concur. If it can be upheld on demurrer it must be for the reason that under its averments an express warranty of the property and a breach thereof are shown. Inasmuch as the paragraph is pleaded in bar of the entire cause of action, the facts therein set up or averred must be such as show or establish an entire failure of the consideration for which the note was executed; otherwise the pleading must be held bad on demurrer. The paragraph in dispute is by no means a model pleading, nor can it be said to have been drafted in an orderly method, and possibly it would be subject, at least, to a motion to make some of its averments more specific and certain, for to an extent they may be said to be vague and uncertain, but not to such a degree as to render it bad on demurrer.

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Under the provisions of our civil code, the rule is well settled that a court in construing a pleading is not required to construe it most strongly against the pleader, but, in order to promote substantial justice between the parties, a liberal construction will be given. In determining the sufficiency of a pleading, we must consider it in regard to its general scope and as an entirety. §379 Burns 1901, §376 Horner 1901; *Stone v. State, ex rel.*, 75 Ind. 235; *Dickensheets v. Kaufman*, 28 Ind. 251; *Dale v. Thomas*, 67 Ind. 570; 4 Ency. Pl. & Pr., 746-749.

Under the facts outlined in the paragraph in controversy it may be said to proceed fairly upon the theory that there was an express warranty upon the part of the plaintiffs in respect to the wind-wheel or machine which they sold to the defendant, and such a breach thereof as breaks down or defeats the plaintiffs' right of recovery, upon the ground that the consideration of the note is shown to have wholly failed. While it is true that the term "warrant" is not shown to have been employed by the plaintiffs in regard to the machine, nevertheless the representations and statements which they are shown to have made in respect thereto are, in our opinion, sufficient to constitute an express warranty. While the word "warrant," especially where the contract of sale of the chattel is reduced to writing, is most generally and appropriately used, still the term is not absolutely necessary to express a warranty by the seller, for the rule is well settled that in sales of personal property no particular form of words is essential to establish or constitute a warranty. Any positive representation, assertion, or affirmation, made by the seller during the pendency of the negotiations for the sale, not the mere expression of an opinion or belief, which fairly expresses the intention of the seller to warrant the article or property sold to be what it is represented, will constitute an express warranty. *Jones v. Quick*, 28 Ind. 125; *Bowman v. Clem-*

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mer, 50 Ind. 10; *Conant v. National State Bank, etc.*, 121 Ind. 323; 28 Am. & Eng. Ency. Law, 747, 748.

At the time of the sale of the wind-wheel the plaintiffs are shown to have represented and stated to the defendant that it was a first-class machine, and in perfect condition, and especially adapted or capable of performing the work for which it was sold, and for which the defendant intended to use it. They expressly represented it to be of such a quality, character, and capacity that under the force of a moderate wind it would grind from 'twenty to thirty bushels of grain per hour, and under a very light wind it would pump an abundance of water. Defendant, as it appears, was ignorant in respect to its qualities and merits, and believed the representations and statements made by the plaintiffs in regard thereto to be true, and relied thereon, and was thereby induced to purchase the wheel, and permit the plaintiffs to deliver and place it on his premises for operation. Facts are alleged which show that it was not of the quality, character, and capacity as represented; that it neither performed nor was it capable of performing the work which the plaintiffs represented and assured the defendant it would do. It is averred that in fact the machine is worthless for any of the purposes for which it was sold, and utterly worthless to the defendant for any purpose. He, as shown, repeatedly notified plaintiffs of its worthless condition and failure to operate, and after several vain attempts on their part to repair and adjust it, and thereby make it perform the work as they represented it would, they finally abandoned it, and left it in its useless or worthless condition on defendant's premises. It appears that he offered to return the machine to plaintiffs, or rather notified and requested them to remove it from his premises, and in the answer in question he still offers to permit them to remove and take it away, and especially requests that they do so. Under and in pursuance of his said offer it appears

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that the court has so molded its judgment as to award a return thereof to the plaintiffs. The representations and statements made by them in regard to the wheel were positive and unequivocal affirmations in regard to its class, qualities, character, and capacity, and they may certainly be said fairly to express an intention on their part to warrant the machine to be and to perform what they represented.

As shown, the defendant relied upon the representations and statements in question, and was induced to purchase the wheel and execute the note for the purchase price thereof. When tested by the rule to which we have hereinbefore referred, the positive representations and statements as made by the plaintiffs in respect to this wheel or machine must be regarded and held as constituting an express warranty. Therefore, under the facts, a warranty of the property is established, and a breach or a failure thereof is shown. Further averments reveal the fact that the failure of the machine to operate or perform the work as it was warranted to do renders it utterly worthless for any purpose or work for which it was sold to the defendant, and that it is worthless, or of no value to him for any purpose whatever. It is disclosed that he frequently offered to return the machine, or, in other words, requested the plaintiffs to take possession thereof, and to remove it from his premises, and this offer and request he continues to make in his answer. When all the facts averred in the pleading in controversy are considered as an entirety, they may be said to show or establish a total failure of the consideration for which the note in suit was executed. Certainly, under the circumstances, the plaintiffs have no grounds for claiming that the machine did not have a fair and proper test or trial, in order that it might be determined whether it satisfied or conformed to their warranty; for, as shown, they themselves made several vain or unsuccessful attempts to make it operate or perform the work, in order to comply

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with their warranty. Under the facts or circumstances, upon no principle of law or equity would the plaintiffs be entitled to anything more than the reasonable value of the machine in the condition in which it is shown to be, or, in lieu thereof, a return, or an offer to return it, upon the part of the defendant. This the defendant offered to do, and their right to have the machine, under the circumstances, the court awarded. Certainly, then, they are not in a position to complain. In a legal sense it may be said that the facts alleged establish that the defendant has been damaged at least to the amount of the purchase price of the machine expressed in or represented by the note in suit. Therefore the answer in question must be considered as sufficient wholly to bar or defeat any recovery against the defendant by plaintiffs on their alleged cause of action. *McCormick, etc., Co. v. Gray*, 100 Ind. 285; *Dill v. O'Ferrell*, 45 Ind. 268; *Booher v. Goldsborough*, 44 Ind. 490; *Kern v. Saul*, 14 Ind. App. 72; *Wynn v. Hiday*, 2 Blackf. 123; *Howard v. Cadwalader*, 5 Blackf. 225; *Glass v. Murphy*, 4 Ind. App. 580.

The warranty in dispute appears to have extended generally to the class, quality, capacity, and character of the machine, and facts are disclosed which fully show that the warranty was broken, or had failed. It is true that a breach or failure of a warranty as stated must be coextensive therewith, but, where the warranty is general in its character or nature, the breach or failure may be shown by a general negation of such warranty. *Leeper v. Shawman*, 12 Ind. 463; *Brower v. Nellis*, 6 Ind. App. 323; *Johnston Harvester Co. v. Bartley*, 81 Ind. 406.

It may be conceded in this case that were it not for the offer to return the machine to the plaintiffs, which the facts show that the defendant made, and which he continues to make in his answer in question, the latter would be bad on demurrer, as the averments therein that the wheel is utterly worthless for any of the purposes for which it was

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purchased, and is worthless or of no value for any purpose to the defendant, would not excuse his failure to return or offer to return the property to the plaintiffs, and under the circumstances the answer would not be sufficient as a defense of a total failure of the consideration of the note in suit. *Lafayette, etc., Works v. Phillips*, 47 Ind. 259. But when the defendant's offer to return the property or machine, as shown, is considered along with the other facts alleged in the pleading, the latter is sufficient to show a total failure of the consideration for which the note was executed. *Wynn v. Hiday, supra*; *Howard v. Cadwalader, supra*.

The fourth paragraph of the answer, to which a demurrer was also overruled, is substantially the same as the second, except that the facts therein are more fully alleged or set forth than they are in the second paragraph.

We conclude that each of the paragraphs of the answer in question is sufficient, and the demurrer thereto was properly overruled. Judgment affirmed.

**PALMER STEEL & IRON COMPANY v. THE HEAT,
LIGHT & POWER COMPANY.**

[No. 20,081. Filed March 12, 1903.]

EQUITY.—*Reformation of Contract.*—Where in an action on a contract for gas delivered, the plaintiff sought equitable relief by invoking the aid of the court in correcting and perfecting the written evidence of the contract, the whole case became one of equitable cognizance and it was proper for the court to award whatever relief the plaintiff proved himself entitled to. pp. 237, 238.

CONTRACT.—*Finding.*—*Judgment.*—In an action to recover for gas furnished, the contract provided that defendant should pay \$30 per day until meters were installed, and thereafter seven cents per thousand feet. It also provided that if the reading of the meters showed the value of the gas to be more than \$30 per day the defendant should pay the difference, and if less than \$30 per day, the plaintiff should credit defendant for the excessive payment. The complaint alleged that it was the intention and agreement of the parties that plaintiff was only to supply gas to three

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puddling furnaces, but by mistake of the scrivener such provision was omitted and defendant took gas for three additional furnaces by secretly opening a stopcock and thereby supplied six furnaces instead of three, and claimed for gas used in the three other furnaces an additional sum of \$20 per day, and as no meters were used plaintiff was unable to state the number of feet of gas consumed. The court found that defendant used 19,787,000 cubic feet of gas worth seven cents per thousand feet and rendered judgment accordingly, without any finding that defendant used any gas not embraced within this contract. *Held*, that the finding by the court of the quantity of gas used, and its value, was not within the issues, and the judgment was erroneous and excessive. pp. 233-240.

From Delaware Circuit Court; *J. G. Leffler*, Judge.

Action by the Heat, Light & Power Company against the Palmer Steel & Iron Company. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Reversed*.

Rollin Warner and *A. W. Brady*, for appellant.
Templer, Ball & Templer, for appellee.

HADLEY, C. J.—Suit by appellee to recover on account for natural gas sold and delivered to appellant on a written contract. The written contract relied upon is in these words: "Agreement made and concluded August 7, 1899, by and between the Heat, Light & Power Company of first part, and the Palmer Steel & Iron Company of second part, all of Muncie, Indiana, witnesseth: That for and in consideration of the payments and rentals to be paid by the second part, as hereinafter mentioned, and in the time and manner hereinafter stated, the first part agrees to allow second part to make connections to first part's high-pressure city lines at the corner of Willard and ——— streets, and use gas therefrom for heating, lighting, and manufacturing purposes in the second part's iron mill located at ——— street in the southeastern part of the city, at the rate of seven cents per thousand feet discharge from first part's line where said connections are made, viz., at Willard and ——— streets; the gas to be used by meter

measurements, both parties being allowed to read the meter, and the second party also to pay a rental per month based as follows: \$2 per month to be paid to first part for the use of meter or meters, viz., at the rate of \$2 per month for each \$50 invested in said meter or meters, the second part, however, having the privilege to purchase meters and use the same, and thus avoid payment of the rental above mentioned; but the first part shall at all times have the privilege of testing such meters as may be furnished by second part, and receive pay therefor at the said above rate per thousand feet for the corrected measurement as made by first part. And it is further agreed by the parties that until such time as the said meters are procured and set for the measurement of said gas the said second party shall pay semimonthly for the gas used, \$30 per day, payable on the 15th of the month in which the gas is used, and for the last half of the month between the 1st and the 5th of the following month, with the further understanding that after the meters have been set, if the reading of the same show the value of gas to be more than the said \$30 per day then the second part shall at once pay for the difference from the time the gas was first turned into the mill up to the date of setting said meters, and if, on the other hand, the payment of the said \$30 per day by the reading of the meters would show the amount so paid to be in excess of that due the first part, then the first part shall allow second part a credit for said excessive payment. This arrangement to be in force and effect so long as the first part desires to furnish the gas, not to exceed November 1, 1899, but that no liability on the part of the first part in case of shortage of gas by leakage of lines or otherwise. And second party can terminate this agreement at any time by the payment of all rentals and gas used up to date, they giving notice and having gas turned off. In witness," etc. (Signed) "Heat, Light & Power Company, by H. C. Zeig-

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ler, P. Palmer Steel & Iron Company, by J. D. Briggs, V. P.”

It is alleged in the complaint that it was the intention and agreement of the parties to the contract that the plaintiff the Heat, Light & Power Company was to, and did, obligate itself to supply gas to three puddling furnaces located on the north side of the defendant's mill, and no others, but by mutual mistake of the parties and the scrivener who wrote the contract, a provision that gas should be furnished only to said three north furnaces was, by mistake and inadvertence, wholly omitted from the contract as written, and the writing was accepted and signed by the parties as expressing the contract, believing that said provision was incorporated therein; that the plaintiff did attach the defendant's system of mill pipes with the plaintiff's high-pressure gas-main, so that gas could be supplied to said three north furnaces; that the defendant had three puddling furnaces located on the east side of its mill building, which were also connected with its system of gas-pipes about said mill, and when gas flowed into the mill pipes the only way to exclude it from said three east furnaces was by closing a stopcock set in one of the pipes, and which said stopcock, under said contract, was to be closed and kept closed during the continuance of the contract; that on the — day of August, 1899, the plaintiff turned gas into the mill pipes, and the said stopcock was secretly opened, and the gas flowed to, and supplied, said three east furnaces as well as the three north furnaces, thereby supplying six of the defendant's furnaces, instead of three as provided by the contract, for forty-three days in August and September, 1899; that under the contract the plaintiff was to receive \$30 for each and every day gas was furnished to said three north furnaces, and the gas so obtained by the defendant for use in said three east furnaces was reasonably worth \$20 per day for each day so used (a bill of

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particulars thereof is filed, marked A), and that none of the gas so furnished the defendant, and used by it, was measured by meter, and no gas-meter was furnished or used in or about the measuring of said gas, and the plaintiff is wholly unable to state the number of feet of gas furnished the defendant as aforesaid; and that there is a balance due and unpaid on said account of \$1,355. Prayer for reformation of the contract, and judgment for \$1,500.

Exhibit A sets forth in detail the account sued on, and contains an item of \$9.95 for making the connection between the defendant's mill pipes, and the plaintiff's gas-main, and forty-three per diem items, stated thus:

August 9. To gas for one day for three furnaces on north side of mill as per contract	\$30.00	
To gas taken to east side of mill....	\$20.00	
		\$50.00
August 10. To gas for one day for three furnaces in north side of mill as per contract.....	\$30.00	
To gas taken to east side of mill....	\$20.00	
		\$50.00
Etc., etc., making total of.....	\$2,154.95	
Credited by payments.....	\$799.95	
Leaving the balance due and unpaid.....	\$1,355.00	

The defendant answered by a general denial and payment. Trial by the court. Special finding, conclusions of law, and judgment in favor of the plaintiff for \$591.59.

The sufficiency of the complaint, the action of the court in overruling appellant's motion for a new trial, in overruling its exceptions to the conclusions of law, and in overruling its motion in arrest of judgment, are properly assigned as error.

The substance of the special finding is as follows: The plaintiff is an Indiana, and defendant an Illinois, cor-

poration; the latter having an office and an iron mill in the city of Muncie, Indiana; in August, 1899, the plaintiff and defendant entered into and executed the written contract set out at the beginning of this opinion; the defendant made connection with the plaintiff's gas line referred to in said contract, and on the 7th day of August, 1899, began to take and use gas from such line for heating, lighting, and manufacturing purposes at its iron mill, and continued from the last preceding date until the 19th day of September, 1899, to use, at said mill, natural gas, intermittingly from said line for said purposes; during the period the defendant used gas for all or parts of thirty-two days, and during these thirty-two days gas was burned by the defendant about 532 hours, and the defendant used and consumed during the time aforesaid 19,737,000 cubic feet of gas, worth seven cents per thousand cubic feet—\$1,381; the plaintiff performed labor for the defendant, in making connections with the defendant's gas-main, worth \$9.95; the defendant before the commencement of this suit paid the plaintiff for gas furnished under said contract \$799.95. From which facts the court states as its conclusions of law: (1) That the plaintiff ought to recover \$591.59; (2) that the plaintiff is not entitled to a reformation of said contract; (3) that the court should render judgment for the above sum against the defendant.

The first assignment is not well taken. Appellant submits that the complaint, being a suit for specific equitable relief, is not sufficient to sustain a money judgment founded upon facts cognizable only by a court of law. We perceive no infirmity in the complaint. This is a suit to recover the price of property sold and delivered under a contract in writing. The ultimate relief sought is exclusively pecuniary, but it is made to appear that such relief can not be adequately administered without a reformation of the writing in such way as to make it speak the truth with respect to the contract that was actually made. The action

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arises out of contract, and the equitable relief sought by invoking the court's aid in correcting and perfecting the written evidence of the contract is but an incident to the main action, and brings the case within the provisions of §281 Burns 1901, which authorizes a plaintiff in all such actions to "join such other matters in his complaint as may be necessary to a complete remedy." Under the averments of the complaint, the prior or contemporaneous reformation of the controlling contract was essential to a complete remedy, and, its consideration being exclusively of equitable cognizance, the effect was to draw the whole case into equity, which court became competent to award whatever relief the plaintiff proved himself entitled to, even though it proved to be but a money judgment. *Towns v. Smith*, 115 Ind. 480; *Field v. Brown*, 146 Ind. 293; *Bowen v. State, ex rel.*, 121 Ind. 235.

A more serious question arises upon the overruling of the motion for a new trial. Appellant insists that the complaint is drawn and that the trial proceeded on the theory that appellant was liable for gas at a per diem rate of \$30 for the three north furnaces, and a *quantum valebat* for the east furnaces, and that, under the theory adopted, the special finding that 19,737,000 feet of gas, worth seven cents per 1,000, was furnished the defendant, was unauthorized and ineffectual, and that the assessment of the amount of damages was too large. The contract stipulates that payment for the gas shall be at the rate of \$30 per day until a meter is furnished by one party or the other. The complaint alleges that no meter was at any time furnished by either party, and, therefore, under the contract, the plaintiff was to receive \$30 for each and every day gas was furnished to said three north furnaces, and the gas so obtained by the defendant and used in said east furnaces was reasonably worth \$20 per day. The bill of particulars accompanying the complaint sets forth the claim, exclusively, except one small item for making the connection, as com-

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posed of forty-three items of \$30 per day for the north, and \$20 per day for the east furnaces. The three bills of account made out under the plaintiff's direction or authority, and forwarded to the defendant before suit was brought, stated the claim under the contract to be \$30 per day. There is no pretense that a meter was furnished or used by either party, or that any attempt was made to measure the gas as it flowed to the defendant's mill, and for this reason, as alleged in the complaint, the plaintiff was wholly unable to state the amount of gas received by the defendant; nor is there a syllable of testimony in the record, that we have been able to find, that claimed or showed that the charge for supplying gas to the north furnaces, in the absence of meters, should be other than \$30 per day. Appellee does not deny that the case proceeded upon the theory contended for by appellant, but affirms, in avoidance, that the case was also tried by both parties upon the theory that the contract for gas embraced only the three north furnaces; that appellant made no claim to a right to use the gas elsewhere than in the north furnaces, and that the real controversy was whether the appellant did, or did not, surreptitiously use it in its east furnaces, by opening the cut-off that, under the contract, was to be kept closed; and that the finding of the court of the quantity of gas furnished the appellant relates to the amount so wrongfully taken by appellant and used in the east furnaces.

Accepting appellee's contention does not free the case of embarrassment. It seeks by its complaint to recover \$30 per day for all gas furnished under the contract to the north furnaces, and the reasonable value of gas wrongfully appropriated and used by appellee in other furnaces. The burden of both issues was upon appellee. It was not entitled to recover for gas wrongfully taken until it had established that some was so taken. The finding of the court is that the defendant used the plaintiff's gas for thirty-two

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days, and during the time used 19,737,000 cubic feet, worth seven cents per 1,000 feet. There is no finding that the defendant used any gas wrongfully, or any gas not embraced within the terms of its contract, and the absence of a finding upon this point must be treated as a finding against the party whose duty it was to make the proof. *Meeker v. Shanks*, 112 Ind. 207, 212; *Archibald v. Long*, 144 Ind. 451, 454. From this it results that the appellee can not recover for the unauthorized use of gas by appellant in the east furnaces, because it has failed to establish that any was so used. It is conceded by both parties that appellee is entitled to \$80 per day for supplying gas to the north furnaces; so the account, under the special finding, properly comes to this:

Thirty-two days supplying of gas to north furnaces	
at \$30 per day	\$960.00
Credit by payments on account before suit.....	799.95
	<hr/>
Balance due plaintiff	\$160.05

The finding by the court of the quantity of gas used under the contract, and its value, was not within the issues, and must be disregarded. *Kitts v. Willson*, 130 Ind. 492, 497; *Louisville, etc., R. Co. v. Davis*, 7 Ind. App. 222, 239; *Woollen, Trial Proc.*, §4334; *Elliott, Gen. Pr.*, §977.

Therefore the finding of the number of feet of gas furnished the defendant, and that it was of the aggregate value of \$1,381.54, must be regarded as surplusage, because no such finding was called for by any issue in the case; and the further finding that the plaintiff was entitled to recover said amount, less the payments made thereon, \$799.95—to wit \$581.59—must be held to be excessive and erroneous.

It thus appearing that the finding and judgment, resulting from an erroneous view of the pleadings and issues, is excessive, the judgment is reversed, and cause remanded, with instructions to grant appellant a new trial.

CONSOLIDATED STONE COMPANY v. MORGAN,
ADMINISTRATOR.

[No. 19,978. Filed March 13, 1903.]

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162	563
160	241
163	325
160	241
165	84

100	241
1171	447

MASTER AND SERVANT.—Death by Wrongful Act.—Negligence.—Complaint.—A complaint in an action for death by wrongful act caused by the fall of a derrick mast near which decedent was working, resulting from the failure of defendant properly to secure one of the guy-ropes, alleging that the condition of the guy-rope was known to the defendant, or could have been known to it by a reasonable inspection at any time within several months before the accident, and that decedent had no knowledge of the defective fastening or the dangers of the place, states a cause of action. pp. 244, 245.

SAME.—Death by Wrongful Act.—Negligence.—Complaint.—A complaint in an action for the death of a servant by wrongful act, caused by the fall of a derrick, alleging that defendant carelessly constructed the derrick by attaching a guy-rope to the side of a small stone, partly in the ground, in such manner that a heavy weight upon the boom-pole would pull the stone around and throw weight upon the other guy-ropes so as to break them, and that decedent had no knowledge of the defective fastening or the danger arising therefrom, states a cause of action. pp. 244, 245.

SAME.—Pleading.—Defective Averments.—Cured by Findings.—Defective averments in a complaint as to knowledge on the part of defendant of the insecure fastenings of the guy-ropes of a derrick, in an action for death by wrongful act, are cured by the finding of the jury, in answer to interrogatories, that defendant had notice of the defective fastening of the guy-rope, and that the giving away of its anchorage was the cause of the fall of the derrick and the injury to decedent. p. 245.

SAME.—Death by Wrongful Act.—Defective Machinery.—Knowledge of Master.—An instruction in the trial of an action for the wrongful death of a servant, caused by defective machinery, that if the master was shown to have constructed the defective machinery, no further proof of knowledge of its defective character was required, was not erroneous. pp. 245, 246.

TRIAL.—Instructions.—Appeal and Error.—Appellant will not be heard to complain of an instruction given by the court which is substantially the same as one asked by him. p. 247.

DAMAGES.—Death by Wrongful Act.—Marriage of Decedent's Widow.—No error was committed in instructing the jury in an action for damages for death by wrongful act that the marriage of the de-

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cedent's widow should not be considered by them in assessing the damages, if damages should be given. p. 247.

TRIAL.—*Misconduct of Counsel.*—*Exception.*—*Appeal and Error.*—To present for review alleged misconduct of counsel in commenting upon instructions to be given the jury, a motion must be made to set aside the submission and withdraw the case from the jury, and an exception saved to the ruling of the court thereon. pp. 247, 248.

SAME.—*Interrogatories.*—Interrogatories seeking to ascertain on which paragraph of the complaint the jury based its verdict are not authorized. p. 248.

EVIDENCE.—*Death by Wrongful Act.*—In the trial of an action for death by wrongful act, evidence in regard to the habits and moral character of the widow of decedent was properly excluded. p. 248.

From Monroe Circuit Court; *Newton Crooke*, Special Judge.

Action by John D. Morgan, administrator of the estate of Albert O. Cass, deceased, against the Consolidated Stone Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

H. C. Duncan, I. C. Batman, R. W. Miers and Edwin Corr, for appellant.

J. R. East and R. H. East, for appellee.

DOWLING, J.—Action by an administrator for damages for the death of his decedent, alleged to have been caused by the negligence of the appellant. The suit was brought in the Lawrence Circuit Court, the venue being afterwards changed to Monroe county. Demurrers to the several paragraphs of the complaint were overruled, as were motions for judgment for appellant, on the answers of the jury to questions of fact submitted to them, and for a new trial. From a judgment against it, the company appeals.

The errors assigned and not waived are the rulings on the demurrers to the first, second, third, and fourth paragraphs of the complaint, and on the motions for judgment for appellant, notwithstanding the verdict, and for a new trial.

The appellant owned a stone quarry situated in Lawrence county, in this State, and used in its business a large derrick, consisting in part of a perpendicular mast, upward

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of fifty feet high, held in an upright position by eight guy-ropes extending from its top and fastened at their lower extremity to stones or other immovable objects. The mast revolved in a socket at its lower end, and was turned around by a wheel on a platform at its base. The stones to be moved by the derrick were fastened to the end of a long arm or boom-pole attached to the mast by a hinge near its bottom, and this boom-pole was raised or lowered by a rope running from its free end to a pulley at the top of the mast, and thence to an iron drum operated by a steam engine located at the power-house. While the decedent was at work on the platform turning the wheel which moved the derrick, a stone weighing some 22,000 pounds was attached to the end of the boom-pole, to be loaded on a railroad car. The great weight of the stone caused the northwest guy-rope to pull from its bed an anchor stone of comparatively small size and weight, to which the guy was fastened. This occasioned a sudden and undue strain upon the adjacent guy-ropes, one or more of which gave away. The derrick then, being without sufficient support, fell, and, in falling, its lower end hurled the surrounding platform and machinery some fifteen feet, and the decedent with them, inflicting such injuries on the decedent that he died in a few minutes.

The grounds upon which the appellant assails the sufficiency of the first, second, third, and fourth paragraphs of the complaint are that they failed to show that negligence of which the appellant had knowledge was the proximate cause of the death of the decedent; that they do not allege that appellant had knowledge of the danger which caused the death of the decedent; that they show that the death of the decedent was not occasioned by the negligence charged, but by another and different cause; and that none of the paragraphs alleges the knowledge by the appellant of the defects of the machinery and appliances occasioning the injury.

It distinctly appears from each of the paragraphs of the complaint that the injury to the decedent was caused by the fall of the derrick mast near which he was working, and that the fall of the mast resulted from the failure of the appellant properly to secure one of the guy-ropes. In the first paragraph it is alleged that the condition of the guy-rope was known to the appellant, or could have been known to it by a reasonable inspection at any time within several months before the accident, and that the decedent had no knowledge of the defective fastening, or the dangers of the place. The second paragraph contains the averment that the appellant carelessly constructed the derrick, by attaching the guy-rope to the side of a small stone, partly in the ground, in such a manner that a heavy weight upon the boom-pole would pull the small stone around, and throw the weight upon the other guy-ropes so as to break them. This paragraph also contains the allegation that the decedent had no knowledge of the defective fastening or the danger arising therefrom. The third and fourth paragraphs do not differ materially from the second. It is shown by these pleadings that the negligence of the appellant in not securely fastening the northwest guy to a suitable anchor or object was the proximate cause of the fall of the mast and the injury to the decedent, and that the appellant had actual or constructive knowledge of the existence of the defects in the fastening. *Clear Creek Stone Co. v. Dearmin, ante*, 162.

If the appellant itself, as charged in the second, third, and fourth paragraphs, negligently constructed the derrick and its appliances, it was chargeable with knowledge of the manner in which the derrick and machinery were built and supported, and no further allegation of knowledge of the defects of such machinery was necessary. *Standard Oil Co. v. Bowker*, 141 Ind. 12, 18. It may also be observed that it is shown by the answers to the interrogatories that, on the Sunday previous to the accident, the master me-

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chanic of the appellant, who was then superintending the work of repairing the guy-ropes holding the derrick, was expressly notified that the stone to which the northwest guy was attached was loose and unsafe. It appears, too, from these answers that the small size and loose condition of the stone could have been discovered by the person making the fastening. The jury further specially found that the block of stone which was being moved by the boom was so heavy that it pulled the stone holding the northwest guy from its place, although the capacity of the derrick was supposed to be sufficient to enable it to carry a stone containing 200 cubic feet, while the stone so attached to the boom contained only 138½ cubic feet; that the giving away of the northwest guy-rope was the cause of the breaking of the north guy-rope; that the breaking of the latter caused the northeast guy-rope to break; and that the insufficient size and weight of the stone which held the northwest guy-rope as an anchor in part caused the derrick to fall and kill the decedent, the north guy-rope being too weak to hold the derrick upright after the northwest guy-rope had pulled loose from its fastening. As the answers to the interrogatories show that the appellant had notice of the defective fastening of the northwest guy-rope, and that the giving away of its anchorage was the cause of the fall of the derrick and the injury to the decedent, the ruling on the demurrers to the several paragraphs of the complaint could not, even in the absence of an averment of knowledge of the defective fastening on the part of the appellant, be prejudicial to it. *Vestal v. Craig*, 25 Ind. App. 573; *Beasley v. Phillips*, 20 Ind. App. 182.

The first, second, third, and fourth paragraphs of the complaint each stated a good cause of action, and the court did **not** err in overruling the demurrers to them.

The supposed infirmity of instructions numbered nine, eighteen, and twenty-one, consists in the statement contained in each of them, that if the appellant was shown to

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have constructed the defective machinery, no further proof of knowledge of its defective character was required. There was no error in this statement of the law. *Standard Oil Co. v. Bowker*, 141 Ind. 12, 18.

The objections taken by counsel to instruction numbered one, asked for by the appellee, are that in stating the issues "it entirely omits the element of knowledge on the part of the deceased." The instruction expressly states that: "The plaintiff charges, in his different paragraphs of complaint, that at the time of the accident the deceased had no knowledge of the manner in which the guys were fastened, and had no knowledge of any defects in said guy-ropes, and did not know the capacity of the derrick, and did not know the weight of the stone attempted to be lifted by the derrick, and was without knowledge of the danger to him working where he was at the time of his injuries." This part of the instruction, which seems to have been overlooked by counsel, certainly does not omit the element of lack of knowledge on the part of the deceased.

Counsel are also in error in their assertion that while the instruction "tells the jury that the sixth paragraph charges that the deceased was ordered by the defendant from his regular employment, that of a scabbler—a place of safety—to the place at the foot of the derrick—one of great hazard"—the complaint alleges only that the deceased was employed "as a scabbler, and it was his duty under such employment * * * to assist at turning the bull wheel at the base of the derrick, and that while so engaged he received the injuries from which he died." A more careful reading of the sixth paragraph would have disclosed that, in another place, it averred, in so many words, that: "The deceased, * * * on said date, had been ordered from his regular employment * * * that of scabbler—a place of safety—200 feet away from the bull wheel and base of derrick, to the place at the base of the derrick—one of great hazard."

Instruction numbered nine, given at the request of the appellee, is complained of because it is alleged to have limited the decedent's assumption of the risks of his employment to those of which he had "knowledge." The point of objection is that the court said nothing concerning defects of machinery or dangers which he could have discovered by the exercise of ordinary care. The court did not confine its instruction to defects and dangers of which the deceased had actual knowledge. This instruction in respect to the knowledge of the decedent was substantially the same as one of the instructions asked by appellant, and the error in giving it, if any, is not available to him. Elliott, App. Proc., §627.

There is nothing in the objection to instruction numbered twelve, given at the request of the appellee, that "It confuses the words 'defect' and 'danger,' making them synonymous." Neither is there any force in the suggestion that "This instruction fails to connect the defendant's conduct with his duty." It would be difficult to set forth the law on this subject more plainly or more concisely than is done in this instruction.

Instruction numbered twenty-four told the jury that the marriage of the widow of the decedent should not be considered by them in assessing the damages, if damages should be given. There was no error in this.

We find nothing objectionable in instructions numbered six, nine, eleven, twelve, seventeen, twenty, and twenty-one.

If counsel for appellee were guilty of misconduct on the trial, in commenting upon the instructions which were to be given by the court, and if, upon objection made in due season, the court refused to relieve appellant from the effect of such misconduct, a motion should have been made on behalf of appellant to set aside the submission, and withdraw the case from the jury. It could not be permitted to proceed with the trial, take the chances of securing a verdict in its favor, and, upon a failure so to do, to receive a new

trial of the cause. *Blume v. State*, 154 Ind. 343, and cases cited.

The court refused to submit to the jury six interrogatories, tendered by the appellant, the object of which was to obtain from the jury, in case they returned a verdict for the appellee, a statement showing upon which paragraph or paragraphs of the complaint it was based. Interrogatories for this purpose are not authorized by the statute. *Clear Creek Stone Co. v. Dearmin*, ante, 162.

The testimony of the witness Kerr in regard to the habits and moral character of the widow of the decedent was properly excluded. For the same reasons, the records of the mayor's court were incompetent evidence. The decedent left a widow and one child surviving him, and the statute provides that the damages recovered must inure to the exclusive benefit of the widow and children, if any. The amount of such damages ought not to be increased or diminished on account of a change in the situation of the widow, children, or next of kin, after the death of the injured person; nor do they in anywise depend upon the character or conduct of one or more of the persons who might, or might not, be entitled to share in their distribution.

No material answer of the jury to the questions of fact is so inconsistent with the general verdict as to overthrow it. The rule in such cases is plain and well understood, and it is not necessary to restate it. *Clear Creek Stone Co. v. Dearmin*, ante, 162; *Stoy v. Louisville, etc., R. Co.*, ante, 144.

The court did not err in overruling a motion for a new trial.

Before discussing any of the questions in this case, counsel for appellee asked that the appeal be dismissed, or the judgment affirmed, because of the failure of the appellant to comply with the rules of this court governing appeals. There has been no attempt, even, to meet the requirements of rule twenty-two, which provides that the brief of counsel

for an appellant shall contain such* a concise statement of so much of the record as fully presents the errors relied upon for reversal. It is very far from a sufficient compliance with this rule to refer in the brief to the page and line of the record where the matter under examination may be found. Notwithstanding this disregard of the rule, we have not dismissed the appeal nor affirmed the judgment on that account, but have made for ourselves such an inspection of the record as was necessary for a proper decision of the cause. But while, in this instance, we have not adopted the course suggested by counsel for appellee, we regard the rule as a most important one, and wish it understood that a due regard for the proper dispatch of the business of this court will constrain us hereafter to insist upon its strict observance.

Finding no error in the record, the judgment is affirmed.

SECURITY ACCIDENT AND SICK BENEFIT ASSOCIATION v. LEE.

[No. 19,964. Filed March 17, 1903.]

PLEADING.—Condition Precedent.—An allegation in a complaint in an action on an insurance policy "that plaintiff fully performed all the obligations required of her" is a substantial compliance with the provision of §878 Burns 1901, that "in pleading the performance of a condition precedent in a contract, it shall be sufficient to allege, generally, that the party performed all the conditions on his part." p. 250.

APPEAL AND ERROR.—Briefs.—Rules of Court.—The sufficiency of the evidence to sustain the finding of fact and law will not be decided where the appellant fails to comply with clause five of rule twenty-two of the Supreme Court which requires that the statement in the brief "shall contain a condensed recital of the evidence in a narrative form, so as to present the substance clearly and concisely." pp. 250, 251.

From Bartholomew Circuit Court; *F. T. Hord*, Judge.

Action by Annie Lee against the Security Accident and Sick Benefit Association. From a judgment for plaintiff,

180	249
161	703
100	249
163	48
163	196
163	388
180	249
164	108

defendant appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

O. H. Montgomery and Marshall Hacker, for appellant.
J. W. Morgan and A. W. Phillips, for appellee.

MONKS, J.—This was an action brought by the appellee to recover sick benefits alleged to be due under a policy of insurance. A trial of the cause by the court resulted in a finding and judgment against the appellant. Two errors are assigned: (1) That the court erred in overruling the demurrer, for want of facts, to the amended complaint; (2) that the court erred in overruling the appellant's motion for a new trial.

The only objection urged against the complaint is, that it fails to comply with §373 Burns 1901, which provides: "In pleading the performance of a condition precedent in a contract, it shall be sufficient to allege, generally, that the party performed all the conditions on his part." The appellee attempted to comply with this statute by averring, "That plaintiff fully performed all the obligations required of her." This was sufficient. While obligation and condition are not synonymous terms, the effect of a valid condition is to impose upon the party to whom it applies the obligation to comply therewith. When, therefore, the appellee has performed "all the obligations required of her," as is alleged in the complaint, necessarily she has complied with all the conditions required to be performed by her under the contract. While it is better to follow the language of the statute, the plaintiff is not required to use the exact language of the statute. It is sufficient if substantially the same language is used. *Aetna Ins. Co. v. Kittles*, 81 Ind. 96; 4 Ency. Pl. & Pr., 633, 634, and notes.

The sufficiency of the evidence to sustain the finding, in fact and law, is challenged by the motion for a new trial. Appellant, however, is not in a position to ask a decision of

this question, on account of its failure to comply with clause five of rule twenty-two of this court, which requires that the statement in the brief "shall contain a condensed recital of the evidence in a narrative form, so as to present the substance clearly and concisely." *Boseker v. Chamberlain, ante*, 114; *Indiana, etc., R. Co. v. Ditto*, 158 Ind. 669. We have, however, read the evidence, and find that there is evidence which sustains all the allegations in the complaint necessary to a recovery. We can not, therefore, under the well settled rule, disturb the finding.

Judgment affirmed.

GOODE, TRUSTEE, v. ELWOOD LODGE No. 166, KNIGHTS OF PYTHIAS.

[No. 20,082. Filed March 17, 1903.]

APPEAL AND ERROR.—*Harmless Error.*—*Pleading.*—Overruling a demurrer to a bad answer is harmless, where all the matters pleaded were provable under the general denial. *p.* 253.

TRIAL.—*Directing Verdict.*—No error was committed in directing a verdict for defendant in an action by a trustee in bankruptcy to recover a sum of money alleged to have been received by defendant as preferential in violation of §60, subd. b of the bankruptcy law of 1898, 30 Stat. 562, where all the evidence concerning the payment was given by the bankrupt, and was in substance that witness who was master of exchequer of defendant lodge when he discovered his insolvent condition informed his wife of his having used the lodge's money and that she mortgaged her separate property and gave the husband the proceeds of the loan which he deposited in bank in his name as master of exchequer of the lodge and afterward delivered his check on the bank account to the trustees of the lodge, which account also included a deposit consisting of dues received from members of the lodge. *pp.* 254-258.

EVIDENCE.—*Conversation.*—In an action by a trustee in bankruptcy to recover a sum of money alleged to have been received by defendant as preferential, evidence as to a conversation had by the trustee with the bankrupt and with the bankrupt's wife long after the payment made to defendant was properly rejected, neither the bankrupt nor his wife being a party to the suit. *pp.* 258, 259.

Goode v. Elwood Lodge, etc.

From Superior Court of Madison County; *H. C. Ryan*, Judge.

Action by *Martin E. Goode*, trustee, against *Elwood Lodge No. 166, Knights of Pythias*. From a judgment for defendant, plaintiff appeals. Transferred from Appellate Court, under §1387u Burns 1901. *Affirmed*.

E. S. Griffin, Richard Broadbent, C. K. Bagot, Alfred Ellison and Thomas Bagot, for appellant.

C. M. Greenlee and B. R. Call, for appellee.

HADLEY, C. J.—This action was brought by the appellant, as a trustee in bankruptcy, to recover a sum of money alleged to have been received by appellee as a preferential payment, in violation of §60, subd. b, of the bankruptcy law of 1898. Verdict and judgment for the defendant. The court overruled appellant's demurrer to the third paragraph of answer which forms the basis of the first assignment of error. It is, in substance, averred in the answer that Headley, the bankrupt, had for more than ten years prior to January 18, 1900, held the office of treasurer of the defendant lodge, and as such officer had received in trust for the lodge \$1,496.37, \$1,356.95 of which amount he had at the date aforesaid converted to his own use, and the balance, to wit, \$139.42, he had, and had had since the day of its receipt, on deposit in the bank to his credit as such treasurer, and had never at any time commingled said \$139.42 with his own money, and held and claimed it only as the money of said lodge; that the wife of Headley receiving knowledge that her husband had converted said sum of \$1,356.95 to his own use, and, being anxious to assist him, paid to the defendant lodge said sum of \$1,356.95 from her own individual estate, in full liquidation and settlement of the sum so converted; that she paid the sum by depositing the amount with the bank and to the credit and in the name of her husband as treasurer of the defendant, and which deposit added to the \$139.42 already on deposit to

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the credit of said treasurer, made up the full amount of money which Headley had received as such treasurer, to wit, \$1,496.37, no part of which amount was ever used, claimed, or owned by Headley, or proceeded or was realized from his property, and was possessed and controlled by him in no other way but as the agent and trustee of said lodge, and which money, upon the request of the lodge, he turned over to it, in discharge of his trust, and not as a payment of a debt.

We see no reason why this is not a good answer. A trustee in bankruptcy will not be permitted, under the guise of an unlawful preference, to bring into the bankrupt's estate, as assets, property that never belonged to it, and to which the bankrupt had no claim. The wife had a legal right to pay her husband's debt, and such payment will not be adjudged fraudulent as against his creditors. Its payment from her separate estate did not diminish the assets of her husband's estate, and it can not be counted as his payment within the meaning of the bankruptcy law referred to.

But whether the answer is good or bad, overruling the demurrer to it did not constitute reversible error, because all the matters pleaded were provable under the general denial, which formed the first paragraph of the answer. A general denial traverses all the material averments of the pleading to which it is addressed. Hence under an answer of general denial the defendant may prove any fact, independent of those alleged in the complaint, which is inconsistent therewith, and tends to overthrow the plaintiff's cause of action. *Marshall v. Beeber*, 53 Ind. 119; *Balue v. Sear*, 131 Ind. 301; *Johnson v. Schloesser*, 146 Ind. 509, 520, 36 L. R. A. 59, 58 Am. St. 367; *Jeffersonville Watter Sup. Co. v. Riter*, 146 Ind. 521.

If appellee lodge never received any preferential payment from Headley, as said by this court in *Marshall's* case, *supra*, "we do not see that there can be any better form by

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which to present the question than by the general denial." So, if the answer sets up facts sufficient to constitute a defense, but amounts to nothing more than an argumentative general denial—as we think it does—it was not prejudicial error to overrule the demurrer to it. *Todd v. Badger*, 134 Ind 204. Likewise, if the facts set up in the answer were insufficient to defeat the plaintiff's cause of action, and all such facts were provable under the general denial, it was not reversible error to overrule the demurrer to it. *State, ex rel., v. Osborn*, 143 Ind. 671, 680; *Board, etc., v. State, ex rel.*, 148 Ind. 675.

2. At the conclusion of the plaintiff's evidence, the court, upon motion, directed the jury to return a verdict for the defendant. This action of the court is called in question. Appellant insists that he did submit proper evidence, which tended to sustain his complaint, and that under many decisions of this court the sufficiency of such evidence should have been left to the jury.

The evidence concerning the payment complained of was wholly given by Francis M. Headley, the bankrupt, and was, in substance, as follows: About the first day of January, 1900, the witness came to realize that he was insolvent. He had been master of the exchequer of appellee lodge for ten years, and as such officer had received of its money \$1,496.37, \$1,356.95 of which he had mingled with his individual money, and converted to his own use. January 8, upon his invitation, he met with the trustees of the lodge, and informed them that his affairs were in bad shape, and he might have to make an assignment, or do something like that, and he would like to settle for the money he owed the lodge, and resign. He informed them that he did not have all the money on hands, and requested that the settlement be postponed a few days to enable him to raise the balance of the money. This was agreed to. He also informed the trustees at that meeting that he had conveyed to his son certain real estate, hoping thereby to invest

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his son with such credit that he might be able to borrow the money with his son as surety, but, having failed in raising the money in that way, he had informed his wife of his having used the lodge's money, and the dilemma he was in, and requested her to raise the money for him on her separate property; that his wife had agreed to help him; that she was raising the money expressly for the lodge, and had already a draft in her possession for \$900, which she had procured by mortgaging her farm in Tipton county, and was awaiting an abstract of title to the "home place," to enable her to procure the balance from the Anderson Loan Association. On January 12, 1900, his son, upon witness' request, conveyed the real estate to witness' wife, which had theretofore been conveyed by witness to his son, without consideration, and for the purpose of giving the son credit as above stated; the consideration expressed in the son's deed to his mother being \$1,356.95 and the assumption by her of a mortgage on the property for \$1,500. Having received the money from the loan association in the form of a check payable to her on January 13, 1900, his wife indorsed the draft and the check, both of which were payable to her, and were hers, and which aggregated \$1,356.95, and gave them to witness, with instructions that he deposit the amount forthwith in the First National Bank of Elwood, for the lodge. In obedience to such instructions, he went immediately to the bank, which was but five blocks away, and delivered the draft and check to the bank, with directions that the same be deposited in his name as master of the exchequer of said lodge, which was accordingly done.

He had received in the first days of January, 1900, for the lodge, but \$350, which was paid in by the members as dues for the preceding month of December, which money he kept in a separate pocketbook, and entirely distinct from his own money. From the amount he had paid divers orders drawn by the officers of the lodge, against the ex-

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chequer, so that on January 17, 1900, there was remaining in his hands of said December dues \$139.42, which he on that date deposited in the bank to his account as master of the exchequer, and which, added to the amount deposited under the directions of his wife, aggregated \$1,496.37, the amount due the lodge, and on the next day, to wit, January 18, as master of the exchequer, he executed and delivered to the trustees his check, which they accepted in discharge of his indebtedness to the lodge, and which is the payment complained of. At the time of his first interview with the lodge trustees, Headley was contemplating bankruptcy proceedings, and had taken legal advice, and given his attorney \$40 to be deposited as security for the costs in the court of bankruptcy. Upon demand of the trustee in bankruptcy, the bankrupt's wife conveyed to said trustee, by deed, the real estate conveyed to her by her son at the request of her husband. The trustees of the lodge knew, or had opportunity to know, that Headley was insolvent, before they received payment of their claim. The wife subsequently filed her claim against the bankrupt's estate and received a cash dividend thereon.

The proper rule with respect to the right of the court to direct the verdict was aptly stated in *Oleson v. Lake Shore, etc., R. Co.*, 143 Ind. 405, 32 L. R. A. 149, thus: "Where the evidence given at the trial with all the inferences which the jury may justifiably draw from it is insufficient to support a verdict for the plaintiff so that such verdict, if returned, should be set aside, the court is not bound to submit the case to the jury but may direct a verdict for the defendant." In addition to the cases there collated, see *Dunnington v. Syfers*, 157 Ind. 458; *Menaugh v. Bedford Belt R. Co.*, 157 Ind. 20.

Under the bankruptcy act of 1898, if an insolvent transfers property to a creditor within four months before the filing of a petition in bankruptcy, and the person receiving shall have reasonable cause to believe that it was intended

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to give him a preference, such transfer and preference shall constitute a legal fraud against the other creditors of the bankrupt, and may be avoided, and the thing, or its value, recovered by the trustee in bankruptcy from the person receiving it. From this it is argued by appellee that the action, being rooted in fraud, may be established by inference alone from the facts admitted and proved at the trial, and hence it was error for the court to withhold from the jury the right to determine what inferences were properly deducible from the proved facts. Back of this contention, however, lies the dominant question: From whose estate was the money paid to the lodge? If the money with which the payment was made was not the money of Francis Headley, and the assets of his estate were not in any way diminished thereby, then it does not concern the creditors of the bankrupt what the purpose and intention of the payor was. The inhibition of the statute affects only the act of the bankrupt in bestowing a greater proportion of his assets, after insolvency, upon some of his creditors than upon others, and has no reference to payments made by third persons not legally bound, although procured to be made by the bankrupt. Here it is shown by the plaintiff (appellant), without contradiction, that Headley had, in violation of his trust, appropriated the lodge's money to his own use, and was exposed to a criminal prosecution. He had tried other methods to raise the money, and had failed. He presented the situation to his wife and she had promised to help him—had agreed to raise the money "expressly for the lodge." The inducement to mortgage her Tipton county farm and the "home place" to raise the money for the specific purpose of paying the lodge is apparent. When she had procured the money in the form of a draft and a check, both payable to her, she placed the credits in the hands of her husband, with specific instructions forthwith to deposit them in the bank for the lodge. The possession of the hus-

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band was not absolute, but subject to the condition imposed. The marital relation does not affect the question. The husband was as competent to act as the agent of his wife as for a stranger in conveying the credits to the bank. His limited possession conferred no right of property, and created no asset of his estate. *Dean v. State*, 147 Ind. 215.

It may be conceded that the wife raised the money for her husband, and for his benefit, but there is not a syllable of testimony in the record that goes to show that that benefit was to be enjoyed in any other way than by a discharge of the lodge debt, and thus probably save the family from dire consequences. Rather than complain, the creditors would consistently have wished for more such transactions, for the effect was to reduce the indebtedness of the bankrupt, and leave the assets undiminished.

As to the \$139.42 which made up the balance of the lodge's debt, there is no question that it was trust funds. It was the undisbursed balance of the December dues, which had been kept by Headley as lodge money, separate and distinct from his individual funds, and never in any way recognized or treated as his own money, and was not, in fact, in any sense property of his estate. When he deposited it in bank as lodge money, and checked it out to the trustees, he did but return to the lodge that which already belonged to them.

From a careful examination of the evidence we are convinced that it clearly appears that payment to appellee was not made by the bankrupt, nor from the assets of his estate, and the court was justified in directing a verdict for the defendant.

In the course of the trial, appellant, upon appellee's objection, was denied the right to testify to a conversation had by him with the bankrupt's wife, and another with the bankrupt, at some unstated time after the payment to the lodge, and after the adjudication in bankruptcy and appointment of appellant as trustee, concerning a claim which

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the wife would assert against the bankrupt's estate for the money advanced by her to the lodge. The conversation referred to took place long after the payment to the lodge was a completed incident. Neither the bankrupt nor his wife was a party to the suit. No grounds were laid for impeachment. The conversation is not pretended to be part of the *res gestae*, and the evidence at most hearsay, and properly excluded. For the same reasons, what was said and done between appellant and the bankrupt's wife in the presence of a third party with respect to the nature and settlement of her claim against the bankrupt's estate was rightly refused.

We find no error in the record. Judgment affirmed.

HOLLINGSWORTH, ADMINISTRATOR, v. THE CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY.

[No. 19,485. Filed December 16, 1902. Rehearing denied March 17, 1903.]

RAILROADS.—Injury to Brakeman.—Complaint.—An averment in a complaint against a railroad company for the death of a brakeman, caused by a low bridge, that defendant had permitted its signals known as "telltales," to warn brakemen of the proximity of the bridge, to become worn and out of repair, is mere surplusage, it not being charged that deceased had any knowledge of telltales, or that he knew what they were intended for, or that they are in common use on railroads as a means of warning. *p.* 263.

MASTER AND SERVANT.—Negligence.—Assumption of Risk.—Railroads.—A recovery can not be had against a railroad company for the death of a brakeman caused by a low bridge which defendant negligently maintained, where it appeared that decedent had been many times warned, and knew from his own observation, of the dangerous condition of the bridge and voluntarily continued in the employment without any promise on the part of defendant to abate the danger. *pp.* 261-266.

From Clark Circuit Court; *J. K. Marsh*, Judge.

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Action by Marshall P. Hollingsworth, administrator of the estate of Wm. A. Francis, deceased, against the Chicago, Indianapolis & Louisville Railway Company. From a judgment for defendant, plaintiff appeals. Transferred from Appellate Court, under §1837o Burns 1901. *Affirmed.*

M. W. Fields, C. L. Jewett, H. E. Jewett, C. A. McRoberts and A. P. Twineham, for appellant.

E. C. Field, H. R. Kurrie, W. S. Kinnan and M. Z. Stannard, for appellee.

HADLEY, C. J.—Appellant, as administrator of William A. Francis, deceased, prosecutes this action to recover damages on account of the death of his decedent, alleged to have been caused by the negligence of appellee.

The only error assigned calls in question the action of the trial court in sustaining appellee's motion for judgment in its favor on the answers of the jury to interrogatories, notwithstanding the general verdict in favor of appellant.

The negligence charged is the constructing and maintaining of an overhead bridge at a point where a highway crosses appellee's railroad near the town of Putnamville; the charge being that the bridge was constructed, and had been so maintained for many years, at such a height from its track that there was less than five feet of space between the bridge and the top of the box freight-cars used by the company, when said cars were moving under the bridge; that the brakes to said cars were so constructed that they could be operated only by brakemen standing on the top of the cars; that the space between the top of a moving freight-train and the bridge was so limited that it was impossible for a brakeman to stand or operate the brake on the top of a box car, while the same was passing under, without being struck by the bridge, and this appellee well knew, because previous to the death of the intestate, at different times, nineteen other brakemen in its employ had been killed or injured by coming in contact with the same bridge while in the performance of their duties on the top of freight-

trains running thereunder; that, on account of its dangerous character, it was the duty of the company to erect at a proper distance from the bridge, signals known as "telltals," to warn brakemen of the proximity of the bridge, and the company, in erecting such telltals, had negligently constructed them so high above the tracks and cars, as to be ineffective, and negligently permitted the ropes of which said signals were composed to become and remain wound around the beam to which they were attached, and negligently permitted the ropes to become and remain worn off at the ends, and so frayed and unraveled that they were, and had been for a long time, to the knowledge of the company, wholly insufficient as a means of warning to the brakeman. It is further alleged that appellee's said railroad runs from New Albany, Indiana, to Chicago, Illinois; that the decedent had, but two days before his death, been employed by appellee as a brakeman on its freight-trains running between New Albany and Chicago, and was killed while performing his duty on the top of a box car, by being carried while on a moving train into violent contact with said bridge; that, at the time of the fatal accident, intestate was wholly ignorant of the dangerous character of the bridge, and ignorant of its position and location, and of the fact that appellee had permitted the telltals to get out of repair and become inadequate to give warning of the proximity of the bridge. The answer is a general denial.

The facts disclosed by the answers to interrogatories, in substance, are these: At the time of his death the deceased was thirty-six years of age, five feet eight inches high, was employed by the company as an extra brakeman June 14, 1899, and continued in service as an extra brakeman until July 7, 1899. On five occasions prior to his death he passed under said bridge in the daytime, and was warned two or three times of its dangerous character by the conductor. A week or ten days before his death he was on a south bound train that stopped at Putnamville to discharge

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freight. As the train started southward, while he was climbing up the ladder on the side of a box car to the top, the conductor warned him that unless he laid down, the overhead bridge—which was near by—“would cut him off at the pockets,” and, heeding the warning, Francis prostrated himself on the top of the car while the same passed under the bridge. Francis had opportunity after his employment, on several occasions, as he passed over the road, to ascertain that the bridge at Putnamville was a low bridge, and dangerous to one standing on a box car while it was passing under it. At 9 o'clock a. m. on July 7, 1899—the same being a bright morning—the deceased, being on a north bound train, while sitting on a brake-wheel which extended two feet and one inch above the top of the car, with his back to the bridge, with his hat over his eyes, and head drooped as if asleep, was struck by the bridge and killed. Within a distance of 130 feet there was nothing to obstruct a view of the bridge, and if the deceased, within that distance, had looked,—which he did not do, though he was not so engaged as to prevent it,—he might have seen the bridge and avoided the injury. To warn brakemen of the proximity of the bridge, the company had previously, at a point 240 feet south of the bridge in question, constructed telltales, composed of ropes one inch in diameter, eight inches apart, suspended in vertical sections from a beam across, and twenty-three feet above, the track, so as to touch and drag harmlessly over the person of a brakeman who happened to be on the top of a box car; but the company at the time of the injury had permitted the telltales to become frayed, worn off, and so shortened as to be of inadequate length for the purpose designed, while if they had been of proper length and in proper condition Francis would probably have been warned of the nearness of the bridge. That he lost his life on account of the dangerous character of the bridge, and the imperfect condition of the telltales. The deceased was in a proper place and in the

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discharge of his duties when killed, and was not able to escape after he discovered the nearness of the bridge.

Counsel for the company admit that both the general verdict and the answers to the interrogatories establish the negligence of appellee as alleged, and furthermore, that the general verdict is a finding of all the material facts against appellee, and that the same must stand unless the answers to the interrogatories state the existence of facts that are in irreconcilable conflict with the general verdict. These admissions remove from the case all the questions discussed except that relating to the assumption of risk by the intestate.

The complaint is constructed upon the one theory,—that the bridge was erected and maintained at a height so low that a brakeman could not safely ride thereunder on top of a box car, and that such condition was known to appellee and unknown to the decedent. The averments concerning telltales do not pretend to constitute an independent, substantive charge of negligence, but their insufficient condition is set forth as an element entering into, and forming a part of, the dangerous character of the bridge. But for this purpose, as we view the complaint, they amount to nothing more than surplusage. It is nowhere alleged that the deceased had any knowledge of telltales, or that he knew what they were intended for, or that they are in common use on railroads as a means of warning, or that he knew appellee had erected, or pretended to erect, any warning device at its Putnamville bridge. We can not presume such knowledge, in aid of the complaint; and without knowing something about telltales, their object and purpose, or that some such device was in common use on railroads as a means of warning against low bridges, it cannot be assumed that the deceased was thrown off his guard or deceived by their absence, in his approach to the bridge. It would not do to say that he was misled by the absence of that which he did not know, or have any cause to believe

existed. We must therefore eliminate from consideration, as not being within the issues, the discussion concerning the impaired telltales.

Certain general principles have been so often declared by this court that we deem it unprofitable to cite cases.

(1) A railroad company owes to its employes the duty to observe reasonable care in the construction of its road, including all lateral and overhead structures that affect their safety; and if it fails to construct and maintain its overhead bridges of sufficient height to make them safe for its employes who are required to work on top of moving trains as they run under them, the company is guilty of actionable negligence to one who without fault is injured thereby. (2) A degree of peril being necessarily incident to service on a railroad train, one accepting such service impliedly agrees to take upon himself the risk of all ordinary and usual dangers that attend such service. (3) An employe has the right to presume that his employer has performed all those duties which the law imposes upon him, and the former does not, therefore, assume a risk which arises out of the latter's negligence. (4) But it is the duty of an employe, in all situations, to be vigilant for his own safety; and when the negligence of his employer has produced an extra hazardous condition, which has become known to the employe, or the dangerous condition is so obvious that an ordinarily prudent person would have seen it, and such employe thereafter, with knowledge of the extent of the peril, voluntarily enters upon or continues in such employment without the promise of the employer to remove it, he will be held to have assumed the risk, and without the right of recovery against the employer for any injury suffered therefrom. *Louisville, etc., R. Co. v. Kemper*, 147 Ind. 561; *Louisville, etc., R. Co. v. Sandford*, 117 Ind. 265; *Indianapolis, etc., R. Co. v. Watson*, 114 Ind. 20, 5 Am. St. 578.

View as we will the conduct of appellee in maintaining the bridge at Putnamville, which in the previous twenty-five years had caused the death or injury of nineteen of its employes, according to the complaint, we are thereby furnished with no legal warrant to excuse the decedent, if, with knowledge of the dangerous character of the bridge, he voluntarily continued to encounter it. And this the answers to the interrogatories show that he did. He had passed the bridge five times in daylight. Two or three times he had been warned by those in charge of his trains, and ten days before his death, when but a short distance from the bridge, and about climbing to the top of a car, he received from the conductor such pointed caution as induced him to lay down upon the top of the car while the train passed under the bridge. These several warnings, and the observations that he necessarily must have made as he lay prostrate upon the car as the same passed under the bridge, were sufficient to impress one of ordinary understanding and caution with the gravity of the danger to one caught on top of a moving train at that place. Having been thus acquainted with the bridge and its hazards, he was no longer in a position to be deceived by it, or to be protected by the presumption that the bridge had been safely constructed. He then knew as much as his employer about its dangerous character; they were then on an equal footing, and the voluntary continuance of the deceased in the employment, without assurance from appellee to abate the danger, was an assumption of the risk.

It is no justification of his conduct to say that appellee's railroad was more than 100 miles long, and that the deceased was an extra brakeman, had been but five times over the road in daylight, and had not had sufficient time and opportunity to become acquainted with the many varying physical aspects of the long line of road, so as to discern, by the exercise of caution, the proximity of the bridge. The

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answers show that he did know, or had sufficient opportunity to know,—which amounts to the same thing,—that somewhere on the line of the road was a dangerous overhead bridge; and thus knowing, he was found to approach the bridge sitting on a brake-wheel, with his back to the forward end of the train, with his head drooped, and his cap pulled over his eyes. This apparently thoughtless conduct, however, is unimportant. Having, by continuing in the service after notice of the danger, impliedly agreed to take his chances of injury by the bridge, his observance of caution and care in approaching it would not have strengthened appellant's claim.

The issue tendered by the complaint is that the intestate did not know of the dangerous bridge. The answers of the jury are to the effect that he did know of it. If he did know of it, as we have seen, and voluntarily continued to encounter it, his next of kin can not recover, and this universal rule arrays the answers to the interrogatories in irreconcilable conflict with the general verdict for appellant.

We find no error. Judgment affirmed.

INDIANA NATURAL GAS & OIL COMPANY v.
O'BRIEN, BY NEXT FRIEND.

[No. 19,477. Filed January 8, 1908. Rehearing denied March 18, 1908.]

NEGLIGENCE.—*Incurring Risk.*—*Notice.*—*Pleading.*—Under §559a Burns 1901, which provides that in actions for personal injuries it shall not be necessary for plaintiff to allege or prove freedom from contributory negligence, plaintiff, in an action for personal injuries caused by the giving way of a defective bridge which she was attempting to cross, is not required to negative in the complaint previous notice or knowledge of the unsafe condition of the bridge. *pp. 269-278.*

APPEAL AND ERROR.—*Bill of Exceptions.*—*Evidence.*—*Record.*—The evidence can not be considered on appeal, where what purports to be a bill of exceptions embracing the evidence does not appear

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to have been presented to the judge for signature within the time allowed by the court. *p. 278.*

APPEAL.—*Bill of Exceptions.*—*Filing.*—The evidence is not properly in the record where the bill of exceptions is not shown to have been filed, either in open court or with the clerk, after being signed by the judge. *p. 278.*

NEGLIGENCE.—*Pleading.*—*Evidence.*—In an action for personal injuries caused by the giving way of a defective bridge, the defendant may, under the general denial, prove that plaintiff had notice of the unsafe condition of the bridge prior to the accident, although notice thereof was not negatived in the complaint. *p. 279.*

From Cass Circuit Court; *D. H. Chase*, Judge.

Action by Lillie O'Brien, by next friend, against the Indiana Natural Gas & Oil Company for damages for personal injuries. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

W. O. Johnson, M. Winfield, G. C. Taber, J. C. Blackledge, C. C. Shirley, Conrad Wolf, J. A. Hindman and M. M. Powell, for appellant.

M. B. Lairy, M. F. Mahoney, S. T. McConnell and A. G. Jenkins, for appellee.

JORDAN, J.—Appellee, a minor, commenced this action by her next friend in the Howard Circuit Court, to recover damages for personal injuries sustained by her, and alleged to be due to the negligence of appellant. The cause was venued to the Cass Circuit Court, wherein, on a trial by the court, appellee was awarded the sum of \$4,000, and, over appellant's motion for a new trial, judgment was rendered on the general finding of the court for that amount. From this judgment appellant appeals, and assigns three errors: (1) Overruling the demurrer to the amended complaint; (2) overruling motion in arrest of judgment; and (3) denying motion for a new trial.

The amended complaint, among other things, discloses that the defendant is a corporation organized and doing business in and under the laws of the State of Indiana,

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and has been such corporation for about ten years, and during that time has been engaged in constructing, maintaining, and operating gas pipe-lines in the gas territory of Indiana, running from Cass county to Chicago, in the state of Illinois. Prior to the 25th day of June, 1899, the defendant, while maintaining and operating its gas pipe-line aforesaid, excavated a deep and wide trench in which to lay its pipe-line across the northwest corner of Spencer park, a public park owned by the city of Logansport, Indiana, and situated near to said city. This park, it is alleged, was open to and frequented by the public generally, and that a public drive and road in said park was much traveled by the public, which fact was well known to the defendant. Said trench, where it crossed said drive and highway, was very deep and wide, and dangerous to persons traveling on the said highway when the trench was not securely bridged and covered. The defendant, at and prior to the aforesaid date, invited the public generally to travel said highway over said trench, by bridging the same so as to make it appear to be safe for travelers to pass over. After alleging these facts, the complaint charges that said defendant "carelessly and negligently bridged and covered said trench at said drive and highway with weak and insufficient material, to wit, with small, defective, weak, and rotten cross-ties, and covered said cross-ties with thin, defective, and decayed boards, which would not stand the weight of an ordinary horse and buggy passing on and over the same; that said cross-ties were not securely fastened in the earth, and that said boards were not nailed or otherwise fastened to such cross-ties, by reason whereof said covering and bridge were from the first insecure and unsafe to the public having occasion to travel over said drive and highway; that on said 25th day of June, 1899, the plaintiff was riding on and along said highway in a buggy drawn by a single horse, and while so driving along said highway, intending and endeavoring to drive over said trench across said bridge or

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covering, and when her horse was on and about to cross the same, said bridge gave way and broke down, and thereby and by reason whereof precipitated her said horse into said deep and wide trench, whereby and by reason whereof the buggy in which the plaintiff was riding was suddenly thrown forward with great force and violence, by which the plaintiff was thrown with terrific force and violence from her seat in said buggy against the front part thereof, to wit, upon the dash-board and the wheels of said buggy, and she was then and there made sick, and greatly and sorely wounded, cut, strained, ruptured, torn, lacerated, and otherwise injured, both externally and internally." It is also alleged that her said injuries are permanent, and by reason thereof she will be an invalid, unable to labor and earn a livelihood, during the remainder of her natural life. A further description of her injuries, her suffering, and the expense which she incurred by reason of medical treatment, etc., are disclosed. She alleges that she is nineteen years of age, and prior to the accident had always enjoyed perfect health, etc. Damages in the sum of \$25,000 are demanded.

The principal objection urged against the complaint, is that there is an entire absence therein of any averments to negative notice or knowledge on the part of the plaintiff of the unsafe or dangerous condition of the bridge previous to the time of the accident. It is therefore insisted that, in view of the absence of such averments, the presumption necessarily must follow that she did know or have knowledge of the peril or danger to which she would be exposed by her act in entering upon the bridge in controversy. Under such circumstances it is said that by her voluntary act in going upon the bridge she thereby assumed or took upon herself the risk of a known danger, and a recovery in this action is therefore barred. Or, in other words, it is contended that under the facts in the complaint, the principle affirmed by the maxim *volenti non fit injuria* applies

and rules the case. It is conceded, and properly so, that the rule which formerly prevailed in this jurisdiction requiring a plaintiff, who sued to recover for personal injuries due to the negligence of the defendant, to allege in his complaint, and prove upon the trial, freedom on his part of contributory negligence, has been abrogated by an act of the legislature approved February 17, 1899. Acts 1899, p. 58, §359a Burns 1901. But the contention is advanced that the latter act did not relieve appellee of the duty of showing by positive averments in her complaint that she had no notice or knowledge, at the time she entered upon the bridge, of its unsafe or dangerous condition. It is insisted that, under the law as it still exists, she was required to negative such knowledge upon her part, in order to show that by her act in entering upon the bridge that she did not voluntarily assume or take upon herself the risk of its unsafe or dangerous condition.

It will be noted that the question as here presented relates wholly to the sufficiency of the pleading in respect to its statement of a cause of action arising out of the negligence of the defendant, and that the relation of master and servant did not exist between the respective parties at the time the alleged injury was sustained. It has been settled, by a long line of decisions of this and the Appellate Court, that in an action wherein it is sought to recover damages for the injury or death of a servant by reason of or on account of the negligence of the master in failing to furnish a safe place or premises in which the servant was required to work, or safe machinery, appliances, or implements with which he was required to perform the duties of his employment, then in such a case the complainant must negative in his complaint knowledge on the part of the servant of the unsafe condition of such premises, machinery, appliances, or implements, in order to show that the injured or deceased servant had not voluntarily assumed the danger complained of as one of the ordinary risks of the service

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or employment in which he was engaged. See the following cases: *Indiana, etc., R. Co. v. Dailey*, 110 Ind. 75; *Louisville, etc., R. Co. v. Sandford*, 117 Ind. 265; *Louisville, etc., R. Co. v. Corps*, 124 Ind. 427, 8 L. R. A. 636; *Evansville, etc., R. Co. v. Duel*, 134 Ind. 156; *Louisville, etc., R. Co. v. Miller*, 140 Ind. 685; *Peerless Stone Co. v. Wray*, 143 Ind. 574; *Louisville, etc., R. Co. v. Kemper*, 147 Ind. 561; *Clark County Cement Co. v. Wright*, 16 Ind. App. 630; *Chicago, etc., R. Co. v. Wagner*, 17 Ind. App. 22; *McFarlan Carriage Co. v. Potter*, 21 Ind. App. 692; *McFarlan Carriage Co. v. Potter*, 153 Ind. 107; *New Kentucky Coal Co. v. Albini*, 12 Ind. App. 497; *Evansville, etc., R. Co. v. Holcomb*, 9 Ind. App. 198; *Linton Coal, etc., Co. v. Persons*, 11 Ind. App. 264; *G. H. Hammond Co. v. Mason*, 12 Ind. App. 469; *Terre Haute, etc., R. Co. v. Pruitt*, 25 Ind. App. 227; *Stalder v. City of Huntington*, 153 Ind. 354.

The statute of 1899, *supra*, under its terms only professes to apply to contributory negligence, and can not be extended to relieve a plaintiff of the burden of showing in his complaint an absence of the assumption of risk on the part of the injured person, when required under the rule asserted and enforced by this court in cases previous to the enactment of the aforesaid act. The rule, as asserted in the cases last above cited, in respect to exacting the duty of a plaintiff in an action in which the relation of master and servant existed, to negative the fact that the injured person did not assume the risk incident to the danger in question, remains untouched and unchanged by the statute of 1899.

Counsel for appellee insist that the doctrine of the assumption of risk must be confined alone to cases of negligence wherein the relation of master and servant or other contractual relations existed between the parties at the time of the accident, and can not be extended to a class of cases to which the one at bar belongs. It may be said that the principle commonly denominated "assumption of risk," in

its technical sense or meaning, as recognized and applied in cases where the relation of master and servant or other contractual relations existed between the parties at the time of the accident, does not extend or apply to a class of cases to which the one under consideration belongs. Nevertheless we hold that what the authorities treat or consider as the doctrine of "incurred risk" or "taking the risk or hazard" or "running the risk" incident to a known and appreciated danger, whatever the terminology used to denominate the doctrine may be, is applicable to a case of the nature or character of the one under review. In such cases, however, the doctrine of "incurred risk" or "taking the risk" or "running the risk" may be said to rest upon, or be, in its nature, effect, and import, the equivalent, at least, of the principle expressed by the maxim *volenti non fit injuria*, and is not founded on the theory of an applied agreement or contract as is usually asserted in suits by a servant against the master. This doctrine or principle, as asserted, is of universal application, and is not confined alone to cases where the relation of the parties are of a contractual nature. Therefore, independently of such relations, there may be in a case like the one at bar an element to the effect that the injured party by his acts in the premises is shown to have incurred or taken upon himself the risk incident to a known and appreciated danger, and, if the facts disclose such a feature or element in the case, it should be recognized and treated accordingly, and not merely as one constituting contributory negligence. *Warren v. Boston, etc., R. Co.*, 163 Mass. 484, 40 N. E. 895; *O'Maley v. South Boston Gas Light Co.*, 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161; *Thomas v. Quartermaine*, L. R. 18 Q. B. D. 685; *Miner v. Connecticut River R. Co.*, 153 Mass. 398, 26 N. E. 994; *Thompson, Negligence* (2d ed.), §184.

In order, however, that the principle to which we have referred may operate or be applicable to cases of the class of the one under review, it must appear that the injured per-

son had knowledge of the danger in question, and appreciated it, and voluntarily, or of his own choice, exposed himself to or encountered such danger, thereby incurring, or taking upon himself, the risk incident thereto. See authorities above cited. Where a person has knowledge of and fully appreciates a danger, and under such circumstances, without any special exigency compelling him, he exposes himself to such danger or peril, his act in the premises may be deemed to have been voluntary. Contributory negligence in such a case can not properly be said to be an element therein, for certainly the voluntary act of a party in exposing himself to a known and appreciated danger is wholly incompatible with an act of negligence or carelessness, for it must be manifest that carelessness in regard to a matter is not the same as the exercise of a deliberate choice in respect thereto. Freedom of the will, in fact, is the thing emphasized by the principle asserted in the maxim *volenti non fit injuria*. It certainly must be true that, in an act where design is shown, the imprudence or negligence of the actor is wholly immaterial as a feature therein. That negligence and wilfulness are inconsistent or incompatible with each other is affirmed in *Parker v. Pennsylvania Co.*, 134 Ind. 673, 23 L. R. A. 552, and reaffirmed in *Cleveland, etc., R. Co. v. Miller*, 149 Ind. 490. In such cases as are ruled by the principle asserted, the voluntary or wilful act of the injured party which brought about the injury is held, and properly so, to be the proximate and sole cause thereof. The theory most generally affirmed, and the one upon which the contributory negligence of the injured person is held to bar a recovery in accident cases, is that his own carelessness or imprudence, under the circumstances, was either partly or wholly the cause of the injury sustained.

It is evident that contributory negligence and incurring the risk of a known and appreciated danger are two inde-

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pendent and separate defenses which should not be confused with each other. Under the rule referred to and sanctioned in such cases as *City of Indianapolis v. Cook*, 99 Ind. 10, *Sale v. Aurora, etc., Turnpike Co.*, 147 Ind. 324, and *Citizens St. R. Co. v. Sutton*, 148 Ind. 169, in regard to a traveler on a public highway or street, the mere knowledge of the injured person in respect to the defects or obstructions encountered upon the highway or street, and to which the injury sustained is attributed, is held not alone to be sufficient to bar the action. Knowledge, however, in such cases is recognized as an important fact, to be considered together with all of the other facts and circumstances in the case, in determining whether the injured party was guilty of contributory negligence; and, under the rule prevailing prior to the passage of the act of 1899, the plaintiff in such cases was only required in his complaint, and under his evidence, to negative such negligence. Now, however, under the provisions of the above statute in such cases, if contributory negligence is an element therein, the burden is cast upon the defendant to interpose and prove it under the general denial as a defense to the action. There are many decisions of this court in actions outside of master and servant in which the injury complained of was imputed to dangerous defects or obstructions in either highways, streets, sidewalks, bridges, or pathways on the premises of another. In some of these appeals at least, if not all, this court, under the circumstances, while recognizing the doctrine of "incurred risk" or "taking the risk" of the danger therein by the injured person, nevertheless, without attempting to distinguish the difference between contributory negligence and that of "incurred risk," has treated the latter, so far as it may have been disclosed as an element under the particular facts, as constituting but a species of contributory negligence. The following cases will suffice to illustrate or verify what we assert: *President, etc., v. Dusouchett*, 2 Ind. 585, 586, 54 Am. Dec. 467;

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Braker v. Town of Covington, 69 Ind. 33, 35 Am. Rep. 202; *Riest v. City of Goshen*, 42 Ind. 339; *City of Huntington v. Breen*, 77 Ind. 29; *Evansville, etc., R. Co. v. Griffin*, 100 Ind. 221, 50 Am. Rep. 783; *Town of Gosport v. Evans*, 112 Ind. 133, 2 Am. St. 164; *Morrison v. Board, etc.*, 116 Ind. 431.

In *Evansville, etc., R. Co. v. Griffin, supra*, the injury complained of was imputed to the negligence of the defendant in failing to cover a deep well situated on its premises, near to a pathway over which the plaintiff was accustomed to pass. In passing thereon in the night-time he fell into the uncovered well and was injured. The court in that case by Mitchell, J., in considering his right to recover, said: "If he undertook to follow the course of the foot-path at night, knowing of the location and condition of the well, and by reason of the darkness, or other cause, missed the path and fell into the well, he can not recover, for the reason that it was negligence to take the risk."

In the appeal of the *Town of Gosport v. Evans, supra*, the action was based on the negligence of the town in maintaining a defective or dangerous sidewalk in the use of which plaintiff was injured. Upon the evidence this court denied a recovery, on the ground that plaintiff was guilty of contributory negligence. It is there said: "If the defect in the pavement, which the plaintiff voluntarily encountered, presented an obstruction, or was of such a character that the town of Gosport was bound to take notice of it, so that it was guilty of negligence in not repairing it, the conclusion follows necessarily that the plaintiff, having full and equal knowledge of its character, was guilty of contributory negligence in venturing upon it, no matter how carefully she may have prepared for the encounter, nor with how much care she went upon it."

Morrison v. Board, etc., supra, was based upon the negligence of the county in maintaining a defective public bridge. This court in that case said: "One who voluntarily

goes upon a structure, with full knowledge of its dangerous condition, and of the perils attending the venture, will be deemed to have done so at his own risk. * * * The law accounts it negligence for one, unless under compulsion, to cast himself upon a known peril, from which a prudent person might reasonably anticipate injury."

These cases serve to show that while the court recognized therein the principle which we assert, still it treated the act of the injured party, under the circumstances, as constituting a species of contributory negligence. It can not be said, however, that the court's action in so doing was wholly unwarranted by precedents, for many other authorities may be found which, without distinction, consider the principle expressed in the maxim *volenti non fit injuria* as embracing both contributory negligence and "incurred risk," and the latter is considered therein as a kind or species of the former. The following cases will serve to illustrate this fact: *Conroy v. Chicago, etc., R. Co.*, 96 Wis. 243, 70 N. W. 486, 38 L. R. A. 419; *Darcey v. Farmer's Lumber Co.*, 87 Wis. 245, 58 N. W. 382; *Kane v. Northern Cent. R. Co.*, 128 U. S. 91, 9 Sup. Ct. 16, 32 L. Ed. 339; *Lawrence v. Hagemeyer & Co.*, 93 Ky. 591, 20 S. W. 704; *Erslew v. New Orleans, etc., R. Co.*, 49 La. Ann. 86, 21 South. 153; *Clements v. Louisiana Electric Light Co.*, 44 La. Ann. 692-697, 11 South. 51, 16 L. R. A. 43, 32 Am. St. 348; *Bunt v. Sierra, etc., Co.*, 138 U. S. 483, 11 Sup. Ct. 464, 34 L. Ed. 1031; *Alabama, etc., R. Co. v. Hall*, 105 Ala. 590, 17 South. 176; *Louisville, etc., R. Co. v. Woods*, 105 Ala. 561, 17 South. 41; *King v. Ford River Lumber Co.*, 93 Mich. 172, 53 N. W. 10; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521, 10 Am. Rep. 417; *Cullen v. Norton*, 52 Hun 9, 4 N. Y. Supp. 774; *Burgin v. Richmond, etc., R. Co.*, 115 N. C. 673, 20 S. E. 473; *Turner v. Goldsboro Lumber Co.*, 119 N. C. 387, 26 S. E. 23; *Alcorn v. Chicago, etc., R. Co.*, 108 Mo. 81, 18 S. W. 188; Broom, *Legal Maxims* (8th ed.), 268; Black,

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Law & Prac., §333. In this latter work the author says: "The assumption of risk is a species of contributory negligence." In *Coley v. North Carolina R. Co.*, 129 N. C. 407, 40 S. E. 195, 57 L. R. A. 817, the supreme court of North Carolina clearly distinguish between assumption of risk and contributory negligence, and hold that they are not equivalent defenses, but are essentially different in their nature and results.

In the cases decided by this court to which we have referred, no question, it appears, was either raised or decided to the effect that it was essential to negative in the complaint not only contributory negligence but also the fact that the injured person did not incur the risk of the danger of which he complained. In fact, we have discovered no decision in any case of the character or nature of the one at bar where this court as a question of pleading has either upheld or denied the contention of counsel for appellant. The question, therefore, under the circumstances, may be considered as being presented for the first time in this appeal. As it is an open one in this jurisdiction, a decision thereof adverse to the insistence of appellant's counsel will consequently not contravene any ruling precedent of this court. We may again assert, however, that the rule enforced in *Peerless Stone Co. v. Wray*, 143 Ind. 574, and in other cases where the relation of master and servant existed at the time of the accident by which the plaintiff is required in his complaint to negative the assumption of the risk incident to the danger arising out of the particular negligence of the defendant, is not affected by the statute of 1899, and still prevails.

We are of the opinion that no sufficient reasons can be advanced for declaring the rule, as contended for by counsel for appellant, by holding that, as a matter of pleading, the plaintiff should have shown that by her voluntary act in going upon the bridge in controversy, under the circumstances, she did not thereby take upon herself or incur the

risk incident to the danger which she encountered. If, under the facts, it could be said that the plaintiff incurred or had taken upon herself the risk incident to the dangerous condition of the bridge in question, the burden was upon the defendant to interpose and prove it under the general denial as a defense to the action.

Again, upon another view of the question, while possibly it may be said that the legislature, by the term "contributory negligence" as expressed in the statute of 1899, *supra*, intended thereby to include or embrace the element also of "incurred risk" in cases like the one at bar, where no contractual relations existed between the parties by reason of the fact that this court had previously treated and considered this element as being in its nature or character but a species of contributory negligence. Therefore, upon this view, the plaintiff would be relieved of the burden by virtue of this statute which counsel for appellant contend she should assume as a matter of pleading and proof, for the act in question expressly casts the burden of proving contributory negligence, in all actions seeking to recover for personal injuries, upon the defendant.

The complaint expressly shows that the negligence of the defendant was the proximate and sole cause of the injury sustained, and under the facts therein alleged it was sufficient to withstand a demurrer.

Some other minor objections are urged against the pleading, but these, in our judgment, are without merit. Other questions are discussed by counsel for appellant, but these all depend upon the evidence, which is not in the record for at least the following reasons: (1) What purports to be a bill of exceptions embracing the evidence does not appear to have been presented to the trial judge for his signature within the time allowed by the court; (2) the bill is not shown to have been filed, either in open court or with the clerk, after being signed by the judge. See act of March 8, 1897 (Acts 1897, p. 244); *Adams v. State*, 156 Ind. 596.

The record presents no available error, and the judgment is therefore affirmed.

ON PETITION FOR REHEARING.

PER CURIAM.—Under the petition for a rehearing counsel for appellant renew their discussion of the proposition that appellee's complaint is not sufficient to state a cause of action, because it does not allege or show an absence of knowledge on her part in respect to the defective and unsafe condition of the bridge. It is specially contended that the court erred in holding that such knowledge or notice on her part, if any, could have been interposed by appellant, and proved under the general denial as a matter of defense to the action. Counsel make the claim that if appellee was not required to disclose by her pleading an absence of such knowledge as a fact essential to her cause of action, then, under the circumstances, if her voluntary action in entering upon the bridge, with notice of its unsafe condition, is a matter of defense, it must be interposed and set up as such by way of a special affirmative answer, and can not be proved by the defendant as held under the general denial, for the reason, as asserted, that the general denial, as a pleading, merely traverses and puts in issue the material facts alleged in the complaint. The error of appellant's learned counsel in this contention is due to the fact that they accord too narrow a scope or design to the general denial under our civil code.

In *Jeffersonville Water Sup. Co. v. Riter*, 146 Ind. 521, this court, in considering the scope of a general denial, said: "A defendant, under the general denial, is not confined to negative proof in denial of the facts stated in the complaint, as a cause of action, but may, upon the trial, introduce proof of facts independent of those alleged in the complaint, but which are inconsistent therewith, and tend to meet and break down or defeat the plaintiff's cause of

action. Works' Practice, Vol. 1, §579; Pomeroy's Rem., §644; Bliss, Code Pleading, §321; Boone, Code Pleading, §65 (Pony Series); Code 1881, §127; R. S. 1881, §377; *Balue v. Sear*, 131 Ind. 301." *East v. Peden*, 108 Ind. 92. It is true that the defendant in the case at bar might, if it so desired, have set up the defense in question by an affirmative plea or answer, but this it was not required to do in addition to pleading the general denial.

We have again fully considered the questions presented by appellant's counsel, but are satisfied that the holding of the court in the former hearing was right; therefore the petition for rehearing is overruled.

THE SOUTHERN INDIANA RAILWAY COMPANY v. MARTIN.

[No. 20,024. Filed March 19, 1908.]

APPEAL AND ERROR.—*Record of Pleadings Transmitted on Change of Venue.*—While it is the duty of the clerk of the court from which an appeal is taken to copy in the transcript a complaint transmitted to such court on change of venue, a copy of the complaint set out in a copy of the transcript made on change of venue will be considered on appeal, where it is properly authenticated by the certificate of the clerk of the court from which the appeal is taken. *pp. 281-283.*

MASTER AND SERVANT.—*Personal Injuries.*—*Pleading.*—*Vice-Principal.*—A complaint alleged that plaintiff while in the employ of defendant and engaged in unloading and hauling stone on defendant's train was injured while assisting in stretching a wire cable used in unloading stone; that the work was done under the orders and direction of M., the manager of the train and work, who was also defendant's foreman and its vice-principal. *Held*, that the complaint when stripped of conclusions failed to show that M. was more than a mere fellow servant. *pp. 283-287.*

SAME.—*Liability for Negligence of Foreman.*—The master may delegate the duties of a foreman with no responsibility to his other servants further than to use due care not to retain an incompetent or negligent foreman. *pp. 287, 288.*

SAME.—*Employer's Liability Act.*—*Pleading.*—A case is not stated within the second subdivision of the employer's liability act

160	280
160	436
160	280
161	674
161	696
161	698
161	700
162	62
162	568

160	280
163	258
160	280
164	149
164	333
164	516
164	521

160	280
166	279
168	230
168	689

160	280
169	59
169	678
169	684
170	10
170	88
170	376

160	280
171	622
171	623

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(§7083 Burns 1901) where it is not shown that the injured employe was subject to the orders and directions of the person whose negligence caused the injury. *p. 289.*

MASTER AND SERVANT.—Negligence.—Pleading.—A complaint alleged that plaintiff was assisting in stretching a cable on a moving train with other employes and that he was injured by reason of the negligence of the foreman in giving the order to carry the cable over the space between the cars, without directing a servant to stand next to the space to keep the cable from falling. *Held*, that the complaint failed to show a causal connection between the negligence charged and the injury. *pp. 289, 290.*

SAME.—Negligence.—Fellow Servant.—Evidence.—In an action against a railroad company for an injury to a servant caused by the alleged negligence of defendant's foreman, the evidence showed that plaintiff with twelve or fifteen other employes were stretching a wire cable on a train of flat cars, disentangling the same; that a loop of the cable was handed by one of the employes across the space between the cars to a man on the other car and in some manner the cable was allowed to drop and became caught in the car wheels or cross-ties and injured plaintiff. *Held*, to show that the cable was dropped by the intervening negligence of one or more of the men in passing it across the space between the cars, rather than that it fell because no one was standing at the intersection as alleged in the complaint. *pp. 290-292.*

From Orange Circuit Court; *T. B. Buskirk*, Judge.

Action by Thomas Martin against the Southern Indiana Railway Company. From a judgment for plaintiff, defendant appeals. Transferred from the Appellate Court, under §1337u Burns 1901. *Reversed.*

T. J. Brooks, W. F. Brooks and F. M. Trissal, for appellant.

J. R. East, R. H. East and McHenry Owen, for appellee.

GILLETT, J.—This is a suit for personal injuries instituted by appellee against appellant in the Lawrence Circuit Court. The venue was twice changed—first to the Jackson Circuit Court, and then to the court below, where there was a verdict and judgment for appellee.

By a proper assignment of error, appellant challenges the ruling of the Lawrence Circuit Court in overruling a demurrer to the original or first paragraph of complaint. It is claimed by appellee that said paragraph is not in the

record. The caption of the transcript of the clerk of the Orange Circuit Court recites that on the 27th day of September, 1900, the defendant filed in the office of said clerk the transcripts of the proceedings in said cause in the circuit courts of Lawrence and Jackson counties, and also the papers and files to said cause, "which transcripts and files," he states, "are as follows, to wit:." The transcript of the clerk of the Lawrence Circuit Court, containing what purports to be not only the proceedings, but also the copies of the files in said cause, is then set out. The certificate of the clerk of the latter court, however, does not authenticate anything beyond the proceedings in that court. There is next exhibited in the transcript what purports to be a transcript of the proceedings in the Jackson Circuit Court, duly certified. Appellant's precipe, that was filed with the clerk of the court below, called for the preparation of a transcript containing not only copies of the transcripts of the proceedings in the Lawrence and Jackson Circuit Courts, but also of "the complaint and the additional paragraph of complaint." In his certificate attached to the record in this cause, said clerk certifies, among other things, that it contains full, true, and complete copies of said transcripts, and of the complaint and additional paragraph of complaint.

The clerk of a circuit or superior court, when a change of venue is taken under §417 Burns 1901, is not required to do more than to "transmit all the papers and a transcript of all the proceedings to the clerk of the court of the county to which the venue is changed," and the latter is then required to receive and receipt for such papers and transcript. The identity of the original papers does not depend upon a certificate of the clerk of the court from which the change is taken, but upon the fact that they are transmitted by him with a transcript of the proceedings. It therefore appears that it was the duty of the clerk below to copy the paragraph of complaint in question into his transcript, as one

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of the original papers received by him. This he did not do. As it clearly appears, however, from his certificate, that the record now before this court does contain a full, true, and complete copy of said original complaint, it is our judgment that we should treat the copy of the complaint set out in the copy of the transcript made on a change of the venue from Lawrence county as a sufficiently certified copy of the original or first paragraph of complaint. Otherwise stated, the clerk of the Lawrence Circuit Court, while he copied the complaint into his transcript, only certified to the proceedings, but the clerk of the court below authenticates the complaint set out in the Lawrence county transcript by his reference to it in the caption of the principal record and by his final certificate.

Said paragraph of complaint is as follows: "The plaintiff, Thomas Martin, complains of the defendant and says: That heretofore, to wit, on the 11th day of April, 1899, the defendant was, and for a long time prior thereto had been, a corporation duly organized and doing business under the laws of the State of Indiana, and had a track, engines, and cars extending from Bedford, Indiana, to a place called Salt Creek, in Lawrence county, in said State; that on said 11th day of April, 1899, this plaintiff, with many other persons, were employes of the defendant and engaged in loading, unloading, and hauling stone on defendant's train used for that purpose, and were all in charge of one George Mathieu, the defendant's manager of said train and work, and who had full charge and management of said train and work done therewith; that said Mathieu was also the foreman of the defendant and in charge of its work in hauling and loading and unloading stone, and was its vice-principal and representative; that so to haul, load, and unload said stone a wire cable or rope was used to remove the stones from flat cars; that said cable was 150 feet long and three-fourths inch in diameter; that on said date the defendant had taken two flat cars loaded with stone to a

point called Salt Creek, some three or four miles west of Bedford, and was returning with the empty cars, and a number of defendant's employes, including the plaintiff, were riding eastward on said cars and the said cable so made of wire was lying on the second flat car forward,—said cars being pushed eastward; that while said cars were being shoved or pushed eastward, and while said rope was so coiled up on the forward flat car, and while said cars were in motion, and running at the rate of twenty miles per hour, as aforesaid, the said George Mathieu, foreman and manager of said train, ordered and directed this plaintiff and others of its employes to straighten and take the kinks out of said cable and to take one end of the same westward to the engine pushing said cars, and ordered and directed this plaintiff to take hold of and manage the uncoiling of said cable, all of which orders were given while said cars were so running as aforesaid; that this plaintiff and others of the employes of the defendant obeyed said order, and the said George Mathieu, in person, ordered and directed said cable rope to be taken over the coupling of the first and second flat cars so in motion, and going eastward, and that said order and command was negligently given, in this, to wit: That the said Mathieu failed to place any one of the defendant's employes at the connection of the two flat cars, and failed to direct any one of its employes to hold said cable rope up so as not to allow it to drop through between said flat cars and catch on the ties of defendant's track and suddenly and quickly uncoil itself with such speed and force as to injure the defendant's employes, and especially this plaintiff; that the said George Mathieu knew that it would endanger the employes of the defendant so to uncoil said rope by allowing it to drop through between said flat cars, and to fail to place a person at said point to hold said rope up so that the same would not drop through said space between said cars; that the defendant through its said foreman and manager, George Mathieu, in giving

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the said order to take one end of said cable back to the engine, and in giving this plaintiff orders so to uncoil said cable and assist in taking the kinks out of the same, and moving and having moved the said cable over the space between said flat cars, without placing a man there to prevent said cable from falling through the space between said cars, was careless and negligent, for the reason that he knew, or should have known by the exercise of reasonable care, that in so doing the said cable was liable to drop through the space existing between said flat cars, and drag on the ground until it caught on a cross-tie, or till it was caught by a car wheel, or fastened by some object, and then suddenly straighten out and jerk suddenly against the plaintiff and other employes with such force as greatly to injure them; that on said 11th day of April, 1899, while the plaintiff was so employed by the defendant at the sum of \$1.25 per day, and while he was in the line of his duty, and while obeying the order of said George Mathieu as aforesaid, and while unable to see the condition of said cable at the point it passed over the space between said flat cars,—said space being at his back and not discoverable from the position he was in,—and having no knowledge that any danger existed from the order so given, the said cable being carelessly allowed by said defendant, through said George Mathieu, while said train was so running at great speed, to drop through an open space to the ground and track, among the cross-ties and beneath the revolving wheels of said freight-cars so in motion, where said rope or cable caught on a cross-tie, or was caught by the wheels of the car, or was in some way caught on the roadbed, and before the plaintiff could escape the said cable suddenly straightened out, struck the plaintiff on his leg and body, caught him, and instantly dragged him off the train on which he was riding, and while obeying said order as aforesaid, and hurled him against the earth and stone so as to break and mangle the knee joint of his left leg, and other-

wise injure his side, spine, and body to such extent that he from such injuries has become and always will be permanently disabled from manual labor, and caused him to suffer much pain and anguish, and deprived him of the power to earn money by his ordinary occupation; that all of said injuries were caused by the negligence and carelessness of the defendant as herein alleged."

We do not perceive how this paragraph of complaint can be upheld, either upon common law principles, or by virtue of the employer's liability act. §7083 *et seq.* Burns 1901. Looked at from either point of view, the paragraph has marked deficiencies. If we assume the former theory, we find that the paragraph, when stripped of its conclusions relative to the position of the man Mathieu, does not disclose that he was a vice-principal. He may have been the foreman, and a man that appellee was bound to obey, and he may have had charge of the work generally, and yet not have been the master's *alter ego* in respect to those duties that the master owed the servant, for such duties may have been devolved upon another and even an inferior servant. *Indiana Car Co. v. Parker*, 100 Ind. 181; *New Pittsburgh Coal, etc., Co. v. Peterson*, 136 Ind. 398, 48 Am. St. 327; *Island Coal Co. v. Swaggerty*, 159 Ind. 664, and cases cited; *Central R. Co. v. Keegan*, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. Ed. 418; *O'Brien v. American Dredging Co.*, 53 N. J. L. 291, 21 Atl. 324. The latter duties can not be delegated in such a way as to absolve the master, and, therefore, whether he makes no provision for their discharge, or charges a servant with their performance, the neglect, if any, is the master's, because it is a master's duty that is neglected. It has been stated that, "*prima facie*, all who enter the employment of a single master are engaged in a common service, and are fellow servants." *Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; *Central R. Co. v. Keegan*, *supra*. If, therefore, in attempting to prepare a complaint in a case of this

general character, there were more attention given to the effort to state facts showing that the alleged negligent employe was charged with the duties that belonged to the master, and less attention bestowed upon the endeavor to manifest the relatively high station and authority of the delinquent employe, there would be fewer reversals of such cases on appeal. Disregarding the conclusions in the pleading, as we must, it is our judgment that it does not show that Mathieu was not a mere fellow servant of appellee's.

Still looking at the complaint from the common law point of view, we have to observe that whatever the authority and position of Mathieu, it appears that in giving the order in question he acted as a mere foreman. We need not state the duties of the master, for they are well understood. See *Northern Pac. R. Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994. It is sometimes a matter of difficulty to make an application of the duty of the master with reference to the furnishing of a proper place to work, but we think that the paragraph of complaint that we are considering can not be upheld on the theory that the master had omitted to furnish a proper place. The train and every appliance that the appellant had furnished may be presumed to have been proper, and it may be presumed that it had no notice that Mathieu was not a proper man to entrust with the duty of acting as foreman in the performance of the particular work. The whole matter was one of detail that the foreman and the men might properly be permitted to attend to in their own way.

If a man may be a foreman, and not necessarily a vice-principal, as the authorities clearly point out, it must needs follow that the men under him ordinarily assume the risk of his negligence in the capacity of foreman. While the common law holds the master to the performance of the duties that the law imposes upon him, yet it recognizes his right to delegate the duties of a foreman, with no responsi-

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bility to his other servants, further than to use due care not to employ or retain an incompetent or negligent foreman.

As was said in *O'Brien v. American Dredging Co.*, 53 N. J. L. 291, 297, 21 Atl. 324: "Whether the master retain the superintendence and management of his business, or withdraw himself from it and devolve it on a vice-principal or representative, it is quite apparent that, although the master or his representative may devise the plans, engage the workmen, provide the machinery and tools and direct the performance of work, neither can, as a general rule, be continually present at the execution of all such work. It is the necessary consequence that the mere execution of the planned work must be entrusted to workmen, and, where necessary, to groups or gangs of workmen, and in such case that one should be selected as the leader, boss or foreman, to see the execution of such work. This sort of superiority of service is so essential and so universal that every workman, in entering upon a contract of service, must contemplate its being made use of in a proper case. He therefore makes his contract of service in contemplation of the risk of injury from the negligence of a boss or foreman, as well as from the negligence of another fellow workman. The foreman or superior servant stands to him, in that respect, in the precise position of his other fellow servants."

In *Central R. Co. v. Keegan*, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. Ed. 418, the plaintiff sought to charge the railroad company with the alleged negligence of the conductor or foreman of a switching crew in failing to have some one in control of a detached, moving car, but the court said: "A personal, positive duty would clearly not have been imposed upon a natural person, owner of a railroad, to supervise and control the details of the operation of switching cars in a railroad yard; neither is such duty imposed as a positive duty upon a corporation; and if O'Brien was neg-

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ligent in failing to place himself or some one else at the brake of the backwardly moving cars, such omission not being the performance of a positive duty owing by the master, the plaintiff in error is not responsible therefor."

See, also, *New Pittsburgh Coal, etc., Co. v. Peterson*, 136 Ind. 398, 43 Am. St. 327; *Ell v. Northern Pac. R. Co.*, 1 N. D. 336, 48 N. W. 222, 26 Am. St. 621, 12 L. R. A. 97; *Potter v. New York, etc., R. Co.*, 136 N. Y. 77, 32 N. E. 603.

We now inquire whether a cause of action is stated under the second or fourth subdivisions of section one of the employer's liability act. These subdivisions undoubtedly create a greater liability than existed at common law, but we do not think that either of them renders the paragraph sufficient. A case is not stated within the second subdivision because of the insufficient allegations relative to the duty of appellee to conform to the order or direction of Mathieu that was given with reference to the cable. It is not necessary that the precise words of the statute should be used, but no form of allegation that amounts to less than the equivalent of the words of the statute will be sufficient. It is conceivable, notwithstanding the allegations of the paragraph, that Mathieu did not have any authority to direct the appellee to do any work upon the return trip.

The paragraph also appears to us insufficient under both subdivisions, and upon any other theory, because of an omission to show a causal connection between the negligence and the injury. The gist of the charge of negligence seems to be the giving of the order to carry the end of the cable over the space between the cars, without directing some servant to stand next to said space to keep the cable from falling. There is a recital, rather than an allegation, as to "said cable being carelessly allowed by said defendant to drop, through said George Mathieu," but we take it that it was not even the purpose of the pleader to charge that Mathieu dropped the cable, so it remains that it does not

appear that it was dropped by anyone while acting under said order. The paragraph does not show that a man was not present endeavoring to hold the cable up, even if he had not been ordered by Mathieu so to do; and in fact it is not made to appear, aside from inference, that the cable was dropped through the space between the cars.

Appellee's counsel insist that the answers to interrogatories that were propounded to the jury show that the general verdict was founded on the additional or second paragraph of complaint. It is unnecessary to determine this question, as the cause will have to be reversed in any event, because of a lack of evidence to support the additional paragraph of complaint.

It appears from the testimony that when the cable was put on the train it was coiled up, and that it was placed at about the center of the surface of the second car from the locomotive; that Mathieu then pulled the link end of the cable westward as far as the locomotive, and, coming back, ordered the men—some twelve or fifteen in number—to take the kinks out of the cable, and that he gave the appellee the further direction to hold up portions of the coil, presumably as an aid to said undertaking; that said work was commenced, the appellee holding portions of the cable, Mathieu disentangling the same and pulling the disentangled portions westward, and two or three other men upon said car, and back of Mathieu, passing the cable westward from hand to hand, and each pulling on the same after he had received it; that a loop of said cable was handed by some man on said car across the space between the cars, to a man on the other car, named Roberts; that, when he had received it, he and a man named Archer started to walk back with it toward the locomotive; that they had gone but a few steps when there was a jerk upon the cable. Roberts is the only man who testified to seeing the end of the cable that was upon said second car. It appears that

said end had a hook upon it, and Roberts testified that the last he saw of said hook was at the time said loop was handed to him, and that said hook was then lying upon said car about ten feet east of the west end of the car that the cable was on. It seems to have been assumed by counsel in some of their questions that the hook dropped between the cars, but there is scarcely a scintilla of evidence to that effect. The only direct testimony upon the subject of the falling of the cable was that of Roberts, who testified that as he felt a jerk in the cable, he looked back, and, perceiving that it was caught on the side, he let go of it. There is absolutely no evidence as to what caused the end of the cable to fall between the cars, if it did so fall, and there is no evidence that there was not a man or men at the west end of said second car at the time the cable fell. There is uncontradicted testimony given by a witness for appellee that there was a man at the opening, and upon said car, who handed the loop to Roberts but a few moments before the accident. If it were the fact that that man was standing and remained at the end of the car, and was assisting in the general work of straightening out the cable and passing it across the space between the cars, it would hardly seem necessary that he should receive a specific instruction not to let the cable fall between the cars. Making due allowance for such deductions as might be made by the process of exclusion, we still think that there were such breaks in the alleged line of causation leading from the alleged negligence to the injury that the jury were not authorized to infer that the appellee was injured by the negligence of appellee's foreman, as charged in the second or additional paragraph of complaint. The hypothesis would be quite as consistent that the cable was dropped by the intervening negligence of one or more of the men in passing the cable across, as would be the assumption that the cable fell because no one was standing at the intersection.

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Appellee's counsel make the point that the certificate of the clerk does not show that it was the original bill of exceptions of the evidence that was incorporated into the record, as required by the precipe. The point is not well taken.

Judgment reversed. The trial court is directed to grant a new trial, and to sustain the demurrer to the original paragraph of complaint.

 POLK v. JOHNSON.

[No. 20,071. Filed March 19, 1903.]

RECEIVERS.—Appointment.—While the appointment of a receiver is a judicial act, it is not improper for the judge making the appointment to seek the counsel and opinion of those interested in the trust as to the fitness of the person to be appointed. *p. 295.*

SAME.—Appointment.—Agreement as to Compensation.—Public Policy.—A receiver, prior to his appointment, sought the insolvent and importuned him to assist him in procuring the appointment as receiver, and, to induce such assistance, promised and agreed, if appointed, to discharge the duties thereof with diligence and fidelity, and without any charge or compensation. *Held*, that the agreement was not invalid for public impolicy as an unwarranted interference with the freedom of judicial action. *pp. 296-298.*

SAME.—Appointment.—Agreement as to Compensation.—Consideration.—Gratuitous Service.—An agreement entered into between an insolvent debtor and creditor that if the debtor would consent to the appointment of the latter as receiver he would serve without compensation is not invalid for want of a sufficient consideration. *p. 299.*

From Johnson Circuit Court; Vinson Carter, Special Judge.

Grafton Johnson filed his final report as receiver of the property of James T. Polk and the latter filed exceptions thereto. From an order of court sustaining a motion to strike out the exceptions, James T. Polk appeals. Appealed from Appellate Court, under clause 3, §1337j Burns 1901. *Reversed.*

L. J. Hackney, C. F. Coffin, Wm. Eldridge and E. F. Barker, for appellant.

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G. M. Overstreet, E. L. Branigin, E. A. McAlpin, R. M. Miller and H. C. Barnett, for appellee.

HADLEY, C. J.—Appellant James T. Polk conducted a large canning and dairy business at the town of Greenwood. His affairs became greatly involved, and he probably insolvent. Tingle, a creditor for a small amount, brought an action in the Johnson Circuit Court for judgment on an account, and for the appointment of a receiver. Polk answered, admitting the averments of the complaint, and confessing that a receiver ought to be appointed. Whereupon the court appointed appellee Grafton Johnson as such receiver, who qualified and entered upon the discharge of his duties. In his amended final report as such receiver, Johnson claimed an allowance for his services in the trust in the sum of \$20,000.

Appellant Polk filed exceptions to said report; subdivision one of exception two being as follows: "It is shown to the court that the property and business of the estate of said receivership have at all times been located at the town of Greenwood, whose population was, when the receiver herein was appointed, about 1,000, and was, to a considerable degree, supported by said business; that said Johnson and his family, when this proceeding was instituted, owned vast properties in and about said town, consisting of business houses and rental dwellings and farming lands, the rental value and rentals of which depended, in a great measure, upon the continued operation of said business,—the said business employing the principal part of the labor of said community; that, in addition to said interests of said Johnson in the prosecution of said Polk's business, he was conducting a banking business which was patronized by said Polk, and said Johnson at said time was a creditor of said Polk in a large sum, the success of which credit, in a measure, depended upon the value of the plant and business of said Polk, and said value depended almost wholly upon the continued prosecution of said business. In view

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of the foregoing facts, the said Johnson, well knowing that the court, or the judge thereof, would probably not appoint a receiver of said property and business who was objectionable to said Polk, sought said Polk, and importuned him to make no objection to his [said Johnson's] appointment as receiver, and to consent to and to request the court to appoint him such receiver; that to induce and persuade said Polk so to withhold objection and so to consent and request, the said Johnson urged that his above-named interest in the business of said Polk, and its successful operation, and his personal friendship for said Polk were such that he could and would, if appointed receiver, discharge the duties of the trust with diligence and fidelity, and without allowance or compensation other than he would receive from the advantages to the said properties, to the said banking business, and to the amount so owing to him; that by reason of the said interests of said Johnson in the success of said business, and by reason of this said promise to discharge the duties of receiver without allowance as aforesaid, the said Polk did not object to said Johnson's appointment as receiver, but consented to such appointment, and requested the court and the judge thereof that said Johnson, by reason of said promises, be appointed receiver of said property and business; that in addition to his said consent and request for the appointment of said Johnson, other persons interested, personally and as creditors of said Polk, requested the court and judge thereof so to appoint said Johnson, because of the economy to said estate in conducting the receivership without salary, fees, or allowances; that in view of the facts aforesaid, and of the further facts that the said Johnson was well qualified for the duties, he was appointed and acted as receiver of said estate. And of each and all of the foregoing facts the said Polk offers to make proof."

The receiver's motion to strike out the above exception, because the same did not contain facts sufficient to consti-

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tute a valid objection to the report, was sustained, and the receiver allowed \$9,500 for his services. This action of the court presents the controlling question in the case.

1. We assume at the outset that there is no reasonable ground for discussion upon the first proposition advanced by appellee, viz., that the litigants have no power to select a receiver for the court by private agreement, even though such agreement is based upon their views of the fitness of the one chosen, and economy to the trust in his appointment. We also take it to be generally acknowledged that the appointment of the receiver, and the fixing of his compensation, are judicial acts that can not be abdicated by the court to one or both the parties to the suit. But while it must be conceded that the ultimate appointment rests solely with the court, to be determined by the exercise of his discretion, we find no principle recognized by the authorities, or supported by sound reason, that forbids the judge the freest access to the counsels and opinions of those interested in the trust, with respect to the most proper selection. Indeed there are many reasons why the cautious judge would seek the advice of others, in cases where he has imperfect knowledge of the fitness of available men, even outside of the parties in interest. There is nothing peculiar in the appointment of a receiver, that his selection must be evolved wholly from the personal knowledge and observations of the judge. The usual course of practice in the English court of chancery in such matters was to refer the selection to a master. Then interested parties were at liberty to appear before the master and nominate suitable persons, from among whom the master would choose the one whose qualifications and fitness his judgment most approved, and report his selection to the court. A similar practice also prevailed in New York prior to their adoption of the present code of procedure. High, Receivers (3d ed.), §§63, 64.

The same considerations that induced the reference to a master under the old practice are now applicable to the

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judge, who is called upon to act without a reference, and who will usually give favorable consideration to one that has been agreed upon by the parties. High, Receivers (3d ed.), §65; Beach, Receivers (2d ed.), §§30, 31; Smith, Receivers, 62.

2. But it is argued that the agreement entered into for the purpose of influencing the appointment was an unwarrantable interference with the freedom of judicial action, and invalid for public impolicy. It will be borne in mind that in the appointment of a receiver, or other such administrative officer, the chief ends to be attained are efficiency and economy in the administration of the trust. It is the officer, and not the mode of selection, that the law regards as important; and, outside those prohibited by statute, the judge, in the exercise of his sound discretion, will select from among those available the one whom he believes, from all the circumstances, will give the most beneficial service. And if efficiency and economy can be secured by private agreement, open and fairly entered into, with one who is willing to perform the work of administering for considerations moving to him wholly outside the trust, we perceive no principle of law, or public policy, that forbids the making of such a contract. The court will closely scrutinize the bargain, when known to him, and if it seems clear that the bargainer is qualified, and the contract free from overreaching and will be beneficial to the trust, the court may properly respect the contract, and make the appointment in pursuance of its terms. *State v. Johnson*, 52 Ind. 197; *Ross v. Conwell*, 7 Ind. App. 375; *Bate v. Bate*, 74 Ky. 639; *Ephraim v. Pacific Bank*, 136 Cal. 646, 648, 69 Pac. 436; *Steele v. Holladay*, 19 Ore. 517, 25 Pac. 77; *Secor v. Sentis*, 5 Redf. 570; *Bowker v. Pierce*, 130 Mass. 262; *In re Hopkins*, 32 Hun 618; *Rote v. Warner*, 17 Ohio C. C. 350; *M'Caw v. Blewit*, 2 McCord (S. C.) 90; *Bassett v. Miller*, 8 Md. 548; *Dolfeld v. Kroh*, 62 Md. xiii; *Koch's Estate*, 148 Pa. St. 159, 23 Atl. 1057; *In re*

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Hay's Estate, 183 Pa. St. 296, 38 Atl. 622; Kerr, *Receivers* (3d ed.), 185.

Beyond question, a person may waive compensation for any labor performed, both before and after completion; and it is a familiar doctrine that one can not, after performance, change his mind, and charge for that which he agreed and undertook to do as a gratuity. *In re Estate of Davis*, 65 Cal. 309, 4 Pac. 22; *Barry v. Barry*, 1 Md. Ch. 20; *Ridgely v. Gittings*, 2 H. & G. (Md.) 58; *In re Cooper*, 93 N. Y. 507, 512; *Mulligan's Estate*, 157 Pa. St. 98, 27 Atl. 398; *Vestry, etc., v. Barksdale*, 1 Strob. Eq. (S. C.) 197.

According to the averments of the exception, appellant Polk owned and was conducting a large canning and dairy business at Greenwood, employing therein most of the labor of the community, and contributing largely to the support of the population of the town. Johnson and his family owned vast properties in and about the town, consisting of business houses, rental dwellings, and farm lands, the rental value of all of which depended largely on the continuance of Polk's business. Polk also kept his business account with Johnson's bank in said town, and owed the latter a large sum of money, which he probably could not pay if deprived of his business. Johnson sought out Polk and recited to him the foregoing considerations, and the vast importance he personally felt in keeping him (Polk) upon his feet, and his business going, and importuned the latter to assist him (Johnson) in procuring appointment to the position of receiver, and, to induce such assistance, promised and agreed, if appointed, to discharge the duties with diligence and fidelity, and without any charge or compensation beyond the benefits he would secure to his property, to his banking business, and in the collection of his debt; that relying upon Johnson's promise to perform the duties of receiver without an allowance, and other promises, Polk requested the court that said Johnson, by reason of his said

promises, be appointed such receiver, and others interested in the estate, for like reason and considerations, made similar requests of the court. The court, acting upon these requests, made the appointment.

Here, then, we have a contract entered into in good faith by the debtor, who, perhaps above all others, desired and sought the payment of his debts, and restoration to the control of his business. We may assume that he would not have requested the appointment of appellee, but for the special inducement held out, and, furthermore, that the court would not have appointed him, had he not been requested so to do by the debtor and a number of his creditors. The question therefore is, shall fraud and deception prevail? To permit appellee to repudiate his solemn engagement, and receive the compensation usual for such services, is to give the sanction of the law to craftiness and chicanery as a means of securing an important and highly remunerative position, not otherwise obtainable. This can not be the law. It is not averred in the exception whether or not the private agreement of Johnson was communicated to the court before his appointment, or that the court had or had not knowledge of it at the time the appointment was made. But while in such cases the proper course is fully to acquaint the judge with the nature and terms of such private treaty before he acts upon the appointment, yet, as between the enforcement of an agreement fairly made with all the beneficiaries of the trust, or made with some of them manifestly for the best interest of all, and by reason whereof his appointment is secured, and permitting such agreement to be used as a cloak to secure a coveted position by double dealing, it is much more in accord with public policy and sound morality to require performance, than to allow the obligee to put aside his covenant after it has served his artful purpose. It is no excuse for appellee to say that he found the duties of the office more onerous than he expected. When he found his expectations disappointed,

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he was at liberty to resign and give the position over to another; but, having held on to it, he will be deemed to have held it upon the terms upon which it was sought and undertaken.

3. The contention, that the contract for gratuitous service is invalid for want of a sufficient consideration, can not be sustained. Appellee received all the bargain called for. He received Polk's assistance in procuring the appointment, and incidentally enjoyed all the material benefits to his property anticipated. There being at least some legal consideration rendered, what was accepted by him at the time as satisfactory will be adjudged by the court as sufficient. As was well expressed by this court in *Wolford v. Powers*, 85 Ind. 294, 303, 44 Am. Rep. 16: "Where a party contracts for the performance of an act which will afford him pleasure, gratify his ambition, please his fancy, or express his appreciation of a service another has done him, his estimate of value should be left undisturbed, unless, indeed, there is evidence of fraud. There *is*, in such a case, absolutely no rule by which the courts can *be* guided, if once they depart from the value fixed by the promisor. If they attempt to fix some standard, it must necessarily be an arbitrary one, and ascertained only by mere conjecture. If, in the class of cases under mention, there is any legal consideration for a promise, it must be sufficient for the one made; for, if this be not so, then the result is that the court substitutes its own judgment for that of the promisor, and, in doing this, makes a new contract." See, to the same effect, *Vigo, etc., Soc. v. Brumfiel*, 102 Ind. 146, 52 Am. Rep. 657; *Keller v. Orr*, 106 Ind. 406; *Price v. Jones*, 105 Ind. 543, 55 Am. Rep. 230; *Shover v. Myrick*, 4 Ind. App. 7-10.

There are other subsidiary questions in the record that are not likely to arise again, and hence have not been considered.

The judgment of the trial court is reversed.

SHULAR v. THE STATE.

[No. 19,954. Filed March 20, 1903.]

CRIMINAL LAW.—Assault and Battery With Intent to Commit Rape.—Evidence.—In a prosecution for assault and battery with intent to commit rape, the prosecuting witness testified that as she was going to her home in the night-time she saw two men standing in a stairway between two saloons; that one of them followed her, demanded to know where she was going, caught hold of her and began to pull her, saying, "Come on with me;" that she resisted, and attempted to give an alarm, and he choked her, and struck her, and let her go. A witness testified that he was standing at the place indicated by the prosecuting witness, on the night in question, with defendant, and saw a woman pass; that defendant followed her, using such language as to indicate his intent to have carnal intercourse with her, forcibly and against her will if necessary. The prosecuting witness shortly after the assault and while she was in a nervous condition accused another as her assailant, but afterward identified defendant. *Held*, that the evidence was sufficient to sustain a conviction for an assault and battery with the felonious intent to commit rape. *pp.* 302-307.

SAME.—Appeal and Error.—Evidence.—The Supreme Court is not warranted in disturbing a judgment in a criminal prosecution unless there is such an absence of evidence in respect to some fact or element material to the crime charged as to present a question of law, which, under the circumstances, must be decided in favor of the convicted party. *p.* 307.

SAME.—Evidence.—Assault and Battery With Intent to Commit Rape.—No error was committed in permitting a witness to testify in a prosecution for assault with intent to commit rape as to whether the prosecuting witness directly thereafter made complaint of the assault and battery perpetrated upon her. *pp.* 307, 308.

SAME.—Instruction.—Assault and Battery With Intent to Commit Rape.—Where in a prosecution for assault and battery with intent to commit rape it appeared that the prosecuting witness shortly after the assault identified a person other than defendant as the guilty one, it was not error for the court to instruct the jury that in the event they found that she had identified such other person as the guilty one, they had the right to take into consideration her condition, surroundings, and all the facts and circumstances shown to exist at the time she made such identification. *pp.* 308, 309.

TRIAL.—Presence of Bailiff in Jury Room.—Criminal Law.—Appeal and Error.—The action of the court in overruling a motion for a new trial on the ground that the bailiff was present in the jury room

160	300
161	364

160	300
167	233

160	300
170	632

160	300
171	322

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and conversed with the jurors while they were deliberating on a verdict will not be reversed on appeal, where such question was presented to the lower court, tried and determined upon evidence pro and con adversely to appellant. pp. 309, 310.

CONSTITUTIONAL LAW.—*Indeterminate Sentence Law*.—*Criminal Law*.—The indeterminate sentence law is constitutional. p. 310.

From Montgomery Circuit Court; *Jere West*, Judge.

William Shular was convicted of assault and battery with felonious intent to commit rape, and appeals. *Affirmed*.

M. E. Clodfelter, H. N. Fine, W. T. Whittington and *Walter Whittington*, for appellant.

W. L. Taylor, Attorney-General, *C. C. Hadley, Merrill Moores, Benjamin Crane* and *A. B. Anderson*, for State.

JORDAN, J.—Appellant was tried in the lower court before a jury on an affidavit and information which charged that he had perpetrated an assault and battery upon the person of Martha B. Stilwell, with the felonious intent to commit a rape. The jury returned a verdict finding the accused guilty of assault and battery, with intent to commit rape, as charged in the affidavit and information, and further found that he was of the age of forty-two years. Over his motions for a new trial, *venire de novo*, and in arrest of judgment, the court rendered judgment on the verdict as follows: "It is therefore ordered, considered, adjudged, and decreed by the court that the defendant William Shular is guilty of assault and battery, with intent to commit a rape, as charged in the affidavit and information herein; that his true age is forty-two years, and that for the offense by him so committed he be imprisoned in the Indiana state prison at Michigan City for a term of not more than fourteen years nor less than two years, and that he be disfranchised and rendered incapable of holding any office of trust or profit for a term of five years, and that he be fined in the sum of \$5, and pay the cost of this proceeding, taxed at \$——."

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Denying these several motions are relied on for a reversal of the judgment. Counsel for appellant contend: (1) That the verdict is contrary to law; and (2) that it is contrary to the evidence for the following reasons: (a) That it wholly fails to prove the felonious intent on the part of appellant to commit a rape; (b) that it is wholly insufficient to identify appellant as the person who committed the alleged assault and battery upon the prosecuting witness.

The State, upon the trial, introduced evidence tending to establish that Martha B. Stilwell, the injured person, was a reputable woman, the wife of McClelland Stilwell, and that she resided with her said husband in the city of Crawfordsville, in Montgomery county, Indiana. She was thirty-eight years old and had been married for fifteen years. On the night of March 10, 1902, her husband was absent from the city, and she attended a "Ben-Hur festival"—a social affair which was held at the Elk's hall in the city of Crawfordsville. She left the festival, as shown, about eleven o'clock that night; leaving earlier than she intended, for the reason that she was suffering at the time with a pain in her back. After leaving the hall for the purpose of going to her home, she first went to a drug store to procure some medicine to relieve the pain in her back. After procuring the desired medicine she left the drug store, a few minutes after eleven o'clock, and started for her home. As she passed west along Main street the electric lights were burning, and she testified that she observed two men standing in a stairway between two saloons. Immediately after passing by the point where these men were standing, she heard footsteps behind her, and became aware that some one was following her, and in a very short time the man who was following her overtook her, and rudely demanded to know where she was going. She informed him that it was none of his business, and thereupon he caught hold of her and began to pull her, saying, "Come on with me." Mrs. Stilwell stated that she demanded that he let her

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go, and threatened to hit him with the bottle containing the medicine that she had purchased at the drug store. Using her own language, she testified further as to the assault committed upon her as follows: "I started to turn round. As I did, he whirled round with me, still holding my arm, and then took a firmer grasp on the arm. I said, 'I want you to let me alone.' He said, 'Keep still. I won't hurt you. Come on.' I fought desperately to get away from him. He said, 'Go with me. I won't hurt you.' I said, 'I won't, and you let me alone.' About this time we had gotten across the alley. He tried to pull me that way. I tried to get away from him, then he said, 'Why, I won't hurt you,' and put his face over my shoulder, right close to my face, and said, 'I won't hurt you.' Again I said loud, 'I want you to let me alone.' He pulled me over toward the alley. I fought with my right arm to get away from him. He took me by the throat. [Just here the witness indicated as to how the person placed his fingers at her throat.] He choked me until I could not get my breath, all the time saying something in a low voice—I don't know what it was. Finally he let loose just long enough that I could give two screams. Then he choked me again and struck me here on this lip, all the time saying something—I do not remember what it was he said—and had the position of his arm pulling me directly straight this way, and took his hand and struck me there [indicating], and then let me go. He ran west down the alley, and I ran north." She then testified that after the man who had assaulted her had run down the alley, and as she was going or running north, she met a man who worked at Robb's grocery, and complained to him about the assault, and soon after she met a police officer, and made a similar complaint to him, and that the police officer blew his whistle. She stated then that she met Mr. Naylor, and other persons with whom she was acquainted, and made complaint to them, and was taken by Mr. Naylor to his house, where a physician was called. The place where

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she was struck on the lip was cut by one of her teeth. Her face was bruised and was bleeding, and the marks on her throat disclosed that she had been choked, and her condition indicated that she had been assaulted by some one. The physician who called to see her treated her for a fractured or broken bone in the throat. Mrs. Stilwell while at Mr. Naylor's house that night is shown to have been in a very nervous, excited, and hysterical condition. She was not able to give any particular description of her assailant. She, however, said that he had a dark mustache, but could not state whether his clothes were black or white, but she believed that he had on a soft hat. While at Naylor's on that night a man by the name of Barnwell was brought in, for her to see if she could identify him as the person who had assaulted her; and she said, after looking at him, "That is the man." She explained afterwards that the reason she made the mistake in identifying Barnwell as her assailant was because she was at the time in a nervous and excited condition when he was brought before her. After the appellant was arrested and placed in jail, Mrs. Stilwell was taken to the prison on Thursday following the Monday night when the assault was committed, in order to see if she could identify him as the person who had assaulted her on the occasion in question. Appellant was lined up with other prisoners in the dining-room of the jail at the time, and she was asked to make an examination of the men, and point out, if she could, the one who had assaulted her. After looking the men over, she recognized appellant as the guilty party, and, pointing to him, said, "There is the man." He, in response thereto, said to her, "Lady, look at me well." She then stepped up to him and said, "Do you see this? [pointing to her lip and some bruises on her face] You did it." It does not appear that appellant made any response to this latter declaration of Mrs. Stilwell.

John Rooney, a witness for the State, testified that soon after eleven o'clock on the night in question he was standing

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in the stairway between the two saloons hereinbefore mentioned, in company with appellant, talking to him; that while they were standing there a woman passed, going west; that, as she passed, the appellant used vile language in regard to her, and as to what he proposed to do; and that, immediately after making this remark about the woman who had passed, appellant started after her, and was about thirty feet behind her. Rooney testified that he saw the woman turn south on Washington street at the First National Bank, and that he saw the appellant turn south at the same place, at a distance of about thirty feet behind her; that he then left and went upstairs, but soon afterwards he heard a police whistle blown.

There is evidence to show that the two men whom Mrs. Stilwell had met after she was assaulted were Jack Kelly a policeman, and Arthur Stewart, and upon her complaint to the former in regard to the assault he blew his police whistle. Several witnesses testified that about eleven o'clock that night they saw appellant in the saloon just east of the stairway in which Mrs. Stilwell said she had seen the two men standing as she passed along. Appellant himself testified that he went into this saloon about a quarter past ten o'clock, and remained there about three-quarters of an hour, and left when the proprietor said he wanted to close up. He resided about two miles west of the city of Crawfordsville, with his father, and, in describing the route which he took home after leaving the saloon, he testified that he went west on Main street to Washington street, and south on Washington street to Pike street, and there turned west and went toward home, and stopped in a barn a short distance from his home, went to sleep in the barn, and remained until about three o'clock in the morning.

Mrs. Stilwell further testified that she saw the man well in the face, who had assaulted her, by means of the electric light burning in the room by the alley where she was as-

saulted; and upon being asked, when she was giving her testimony, if she could point out the man, she turned and pointed to the appellant, and said to the jury that he was the man. There is evidence other than that of Mrs. Stilwell to show that when she was taken to Mr. Naylor's residence she was bleeding and bruised, and the disheveled condition of her clothing indicated that a fierce assault had been perpetrated upon her. Before she was called upon to identify the appellant at the jail, she suggested to her husband that probably she was mistaken in identifying Barnwell as her assailant.

On the night in question the alley down which Mrs. Stilwell testified her assailant ran after he let her go was muddy, and there is evidence to show that there were tracks made in the mud by a man running west down the alley. There is other evidence given in the case, all of which either directly or indirectly goes to corroborate Mrs. Stilwell's statements, and points to appellant as the guilty person. In fact, there seems to be no witness who contradicts the statements of Mrs. Stilwell that she was followed on the night in question by some man and assaulted in the manner as herein shown.

The appellant, as a witness in his own behalf, denied that he followed her or made any assault upon her. It was shown by appellant's own admissions on his cross-examination when on the witness-stand that he had frequently violated the penal laws of the State, and had served a term in the penitentiary.

Possibly some evidence not strictly proper may, unchallenged, have been given to the jury on the trial of this cause; but as to whether there is or is not evidence in the case of such a character we neither affirm nor deny, but consider only such questions as are duly presented. We can not disturb the judgment on either of the grounds that the verdict is contrary to the law or contrary to the evidence, for the reason that there is evidence which fully sus-

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tains the verdict of the jury in every material respect. When all the evidence and circumstances in this case are considered, we are of the opinion that it can not be seriously controverted but that appellant was the person who committed the assault and battery on the prosecuting witness, and that he perpetrated the same with the felonious intent to commit the crime of rape. The language or term used by him to express what he said to the witness Rooney when Mrs. Stilwell passed along the sidewalk near the stairway in which these two men were standing in regard to her, and as to what he intended to do, is too vile and vulgar to set out in this opinion. It fully discloses, however, that his purpose or intent in following her, and in making the violent and brutal assault on her as he did, was to have carnal intercourse with her, forcibly and against her will, if necessary, to accomplish his base purpose or design.

The rule is well settled that before this court, upon appeal, is warranted in disturbing a judgment in a criminal prosecution on the evidence alone, that there must be such an absence of evidence in respect to some fact or element material to the crime charged as to present a question of law, which, under the circumstances, must be decided in favor of the convicted party. *Lee v. State*, 156 Ind. 541, and cases there cited.

Upon the trial below one Arthur Stewart, a witness in behalf of the State, was asked the question by the State's attorney if Mrs. Stilwell on the night in question, immediately after the assault upon her, complained to one Jack Kelly. The witness, in response to this question, answered, "I think so." He was then asked if she stated that she was assaulted. Counsel for appellant objected to this question on the ground that, as propounded, it was intended to elicit from the witness what she said at the time she made the complaint to Kelly. The objection was overruled, to which appellant excepted, and the witness in response to the question answered, "Yes, sir." It was disclosed by the

evidence that Jack Kelly was one of the persons whom Mrs. Stilwell met on the street shortly or soon after she had been assaulted, and made complaint to him in regard to the assault. Under the circumstances in this case, it was proper for the State to inquire of the witness in question if she made complaint to Kelly to the effect that she had been assaulted. The question of which appellant complains did not profess to call upon the witness Stewart to give a detailed statement of what she said in regard to the outrage that had been perpetrated upon her, but it simply called upon him to answer "Yes" or "No" as to whether she had made the complaint about the assault and battery perpetrated upon her. Both the question and the answer of the witness in response thereto were proper, and neither afford the accused any grounds for complaint. *Thompson v. State*, 38 Ind. 39; *Cross v. State*, 132 Ind. 65; *Polson v. State*, 137 Ind. 519.

It is next insisted that the court committed an error in giving instruction number six to the jury. Counsel condemn this charge on the ground: (1) That thereby the trial court made an argument to the jury, whereby it attempted to excuse Mrs. Stilwell for the mistake which she made in the identification of Mr. Barnwell as her assailant on the night of the assault; (2) that it made her alleged nervous, excited, and hysterical condition at the time of the identification of Barnwell too prominent as an excuse for the mistaken identity. The charge in question, to the extent to which the court thereby professed to advise the jury, is as fair and favorable to appellant as he could demand. It contained no specific mention in regard to the nervous, excited, and hysterical condition of Mrs. Stilwell at the time she identified Barnwell. The court thereby, among other things, merely advised the jury that in weighing her testimony as a witness upon the trial, they had the right, and it was their duty, to take into consideration the fact that before she identified the defendant as her assail-

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ant she had identified another and different person as the guilty one who perpetrated the assault in dispute. In connection with this part of the charge, the court informed the jury that, in the event they found that she had identified such other person as the guilty one, they had the right to consider her condition, surroundings, and all the facts and circumstances shown to exist at the time she made such identification. It can not reasonably be insisted that by this instruction the court either gave or sought to give any undue prominence to her condition at the time she made the alleged mistake in her identification of Barnwell, which mistake she upon the trial attributed to her nervous, excited, and hysterical condition at the time of the identification. If the jury believed that she was in her normal condition when she identified Barnwell as the perpetrator of the crime in question, that fact would be an important feature for the jury to consider what weight, if any, ought to be accorded to the fact that she subsequently identified appellant as the assailant. If she was, as shown by the evidence, nervous, excited, and hysterical at the time, these facts, when considered, might be of much weight in explaining the reason why she made the mistake in identifying Barnwell as the guilty person when he was brought into her presence in the room where she was lying upon a couch immediately after the assault in controversy.

It is next insisted that appellant was prejudiced or harmed by the presence of the bailiff in charge of the jury, being in the jury room and conversing with the jurors at the time they were deliberating upon a verdict. This question was presented to the lower court, tried, and determined upon the evidence pro and con adversely to appellant. The affidavit of the bailiff in question positively shows that he went into the jury room only for the purpose of attending to some of the necessities of the jury, and when in the room he spoke to some of the jurors in regard to some of their wants and necessities; that he was not present in the

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jury room at any time when the jurors were deliberating upon a verdict or discussing the evidence in the case; that he took no part whatever in any of their deliberations, and at no time did he speak to any of the members of the jury concerning the matter or matters upon which they were deliberating, except only to inquire of them if they had agreed upon a verdict, and in no manner did he influence or attempt to influence the jury, or any of the members thereof, in making up their verdict in the case. The evidence given by the bailiff, together with other evidence in corroboration thereof, if accepted by the trial court as true, which it apparently did, is sufficient to justify the holding of that court that the conduct or acts of the bailiff in question in no manner harmed or prejudiced appellant in any of his substantial rights. Consequently, under such circumstances, the decision of the lower court on the question involved or in issue will not be disturbed by this court on appeal. *Doles v. State*, 97 Ind. 555; *Hinshaw v. State*, 147 Ind. 334, and cases cited.

It is lastly contended that the statute known as the indeterminate sentence law is unconstitutional, and that the court erred in advising the jury in respect to the verdict they should return in the event they found appellant guilty of the felonious crime charged in the affidavit and information. The constitutional validity of this law has been repeatedly affirmed by a majority of this court. *Miller v. State*, 149 Ind. 607, 40 L. R. A. 109; *Skelton v. State*, 149 Ind. 641; *Vancleave v. State*, 150 Ind. 273; *Wilson v. State*, 150 Ind. 697; *Davis v. State*, 152 Ind. 34, 71 Am. St. 322; *Colip v. State*, 153 Ind. 584, 74 Am. St. 322.

The verdict of the jury, in respect to its form, and the judgment of the court thereon, is each apparently in substantial compliance with the act or statute in controversy. The writer of this opinion, however, speaking for himself alone, and not for the court, concedes that there is much force and merit in the argument of appellant's learned

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counsel in respect to the invalidity of the act in question; and for the reasons stated by him in the dissenting opinion in *Miller v. State*, *supra*, he still believes that some of the essential provisions of the indeterminate sentence law are clearly antagonistic to certain provisions of the State's Constitution. The majority of the court, however, as now constituted, adhere to the decisions in the cases last above cited, and reaffirm the constitutional validity of the law in controversy.

There being no available error presented in this appeal, the judgment is affirmed.

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[No. 19,987. Filed March 20, 1903.]

FRAUD.—Contracts.—Statute of Frauds.—Representations made by a banker and business man, well known to plaintiff, that stock in a proposed corporation to which certain patent rights were to be transferred would be more valuable than any bank-stock, and that defendant proposed to join plaintiff in the purchase of the patent rights and the organization of a company, made for the purpose of inducing plaintiff to invest in such corporation, when in truth defendant was investing no money, but had a secret arrangement with the promoter whereby he was to receive his stock and a certain sum of money for inducing others to take stock in such concern are not within the statute of frauds (§6634 Burns 1901), and the contract thereby induced is voidable. *pp. 312-318.*

PAYMENT.—Fraud.—Ratification.—Where plaintiff executed his note for certain stock in a company, and paid same before discovering the fraud practiced upon him in inducing him to purchase the stock, such payment will not operate as a ratification of the transaction. *p. 318.*

From Fountain Circuit Court; *J. M. Rabb*, Judge.

Action by Jerome Clark against David A. Coulter. From a judgment for plaintiff, defendant appeals. *Affirmed.*

H. C. Sheridan, for appellant.

Joseph Claybaugh, *N. P. Claybaugh* and *J. P. Gray*, for appellee.

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DOWLING, J.—This is an appeal from a judgment for damages for an alleged fraud practiced by the appellant as a promoter of the organization of a company for the manufacture, sale, and erection of a combined hedge and wire fence. The questions of law presented arise upon the rulings of the court sustaining each paragraph of the complaint, its refusal to render judgment for the appellant on the answers of the jury to questions of fact submitted to them, and the denial of a motion for a new trial.

The first paragraph of the complaint was, in substance, as follows: On June 20, 1895, the Indiana Hedge & Wire Fence Company owned the right, under letters patent issued by the United States of America, to manufacture, sell, and erect in Clinton county, Indiana, and elsewhere, an improvement known as a "growing hedge and wire fence," and was desirous of selling the right to make, sell, and erect such fence in said county. The appellant, who was a banker and successful business man of said county, and who was known to the inhabitants of said county, conspired and agreed with certain agents of the said Indiana Hedge & Wire Fence Company to induce the appellee and other citizens of said county to purchase from said company, for the sum of \$12,500, the right to make, sell, and erect said fence in said county. In furtherance of said conspiracy, the appellant, with the other agents of said company, agreed to call upon the appellee, and to represent to him that the appellant was so convinced of the great value and availability of the said patent rights and of the said territory that he was ready and anxious to join with other citizens of said county in the purchase of said patent rights for said Clinton county at said price of \$12,500, and to organize a corporation to be known as the Clinton County Hedge & Wire Fence Company, with a capital stock of \$25,000, for the purpose of making, selling, and erecting such patent fence. The plan of such proposed organization was as follows: The persons forming said last-named cor-

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poration were to execute their promissory notes to the said Indiana Hedge & Wire Fence Company, in consideration of the assignment of such patent rights for said Clinton county to the said Clinton County Hedge & Wire Fence Company. Thereupon, the last-named corporation was to issue to the persons so associated in it shares of its capital stock to the amount of \$2 for every \$1 of the sums for which their respective notes had been so executed to the said Indiana Hedge & Wire Fence Company. It was further agreed between the appellant and said other conspirators that the appellant should solicit the appellee and other citizens to join him in the purchase of said patent rights for said county, and that appellant should pretend that he was one of the joint purchasers of such patent rights, and was executing his notes for the same; but it was secretly agreed between the appellant and his co-conspirators that, if the appellant should succeed in inducing the appellee and said other citizens to purchase said patent rights from the said Indiana Hedge & Wire Fence Company, and to enter into said scheme, then the notes executed by the appellant for his share of the purchase money for said patent rights were to be returned to him by said Indiana Hedge & Wire Fence Company, and he was to receive \$1,000 of the proceeds of the sale of such patent rights for his services. Pursuant to this scheme, the appellant and his co-conspirators called on the appellee and on other citizens, and represented that the patents were of great value; that they were worth \$25,000; that the appellant was so convinced of their value that he was ready and anxious to go in with appellee and other citizens in the purchase of said rights at the price of \$12,500, and earnestly solicited the appellee and others to join him in the said purchase, and in the organization of the said Clinton County Hedge & Wire Fence Company. Appellant assured the appellee and other citizens of said county that, in his judgment as a business man and financier, the stock of said proposed corporation would be more

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valuable than any bank-stock, and that its dividends would pay the notes executed to the said Indiana Hedge & Wire Fence Company long before they became due. The appellee, having no knowledge of the facts, and believing the said representations, relied thereon, and, on September 10, 1895, entered into said agreement, and, along with twenty-three other citizens of said county, executed his two notes to said Indiana Hedge & Wire Fence Company, each in the sum of \$250, payable at twelve and eighteen months after date, and the appellant, also, at the same time pretended to execute his notes to the said company for the same amount, and joined in causing the said Clinton County Hedge & Wire Fence Company to be organized, to which said patent rights were thereupon transferred by said Indiana Hedge & Wire Fence Company. The said Clinton County Hedge & Wire Fence Company issued to the appellee stock of the said company to the amount of \$1,000. As soon as the said notes were issued to said Indiana Hedge & Wire Fence Company, and said last-named company transferred said stock to the appellee and the other persons executing said notes, appellant's co-conspirators caused the notes executed by the appellant to be handed back to him, and they paid to him \$1,000 for his services in carrying out said scheme. The said patent rights for Clinton county were of no value, and said stock was worthless, as the appellant at all times well knew. Before the appellee discovered the fraud which had been practiced upon him, he paid his said notes. He was unable to reconvey said patent rights to said Indiana Hedge & Wire Fence Company, for the reason that, as a part of the said scheme of fraud, they were conveyed to the said Clinton County Hedge & Wire Fence Company, and were beyond his control. The second paragraph of the complaint is similar to the first, and need not be set out.

The sufficiency of the facts stated in each paragraph to constitute a cause of action is questioned by the

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demurrers. The objections, taken to each paragraph of the complaint are that the alleged representations made by the appellant related to the credit, conduct, and dealings of a third person, and that, as they were not in writing and signed by the appellant, they were within the statute of frauds, and not actionable; that the alleged representations were expressions of opinion, merely, and not statements of material facts; that as the appellee had the opportunity to examine into the truth of the representations for himself, they will not support a charge of fraud; and that the payment of his notes by the appellee after knowledge of the fraud amounted to a ratification of the transaction.

We think it entirely clear that the representations charged to have been made by the appellant to the appellee for the purpose of inducing him to participate in the purchase of the worthless patent rights and corporation stock were not such "representations concerning the character, conduct, credit, ability, trade or dealings of any other person," as are contemplated by §6 of the statute of frauds. §6634 Burns 1901, §4909 R. S. 1881 and Horner 1901; *Hodgin v. Bryant*, 114 Ind. 401; *Worley v. Moors*, 77 Ind. 567; *Breedlove v. Bundy*, 96 Ind. 319. The representations were made in pursuance of a conspiracy to obtain the notes and money of the appellee by fraud, entered into and carried into execution by the appellant and other persons. They were a material part and parcel of the general scheme, and they were made in connection with fraudulent and dishonest artifices which were calculated to deceive and mislead the appellee. The person making these fraudulent representations was a banker and a successful business man, possessing the confidence of the appellee and of the community in which he and the appellee lived. He expressly held himself out as a disinterested party, seeking for himself, and recommending to the appellee, a valuable and profitable investment. He declared that, in his judgment as a business man and financier, the stock of the proposed

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corporation to which the patent rights were to be transferred, would be more valuable than any bank-stock. The appellant professed to be so thoroughly satisfied as to the success of this venture that he was eager to join the appellee and other citizens in making the purchase of the patent rights, organizing the Clinton County Hedge & Wire Fence Company, and converting the patent rights into the stock of that corporation. Having persuaded the appellee to make the investment, the appellant went through the form of executing his own notes in the presence of the appellee and the other citizens he had interested in the enterprise. He concealed from the appellee and from the other purchasers of the patent rights the fact that he had any connection with the parties owning or controlling the patents, or that he had arranged with them for a special advantage to himself, and for a valuable consideration for his efforts to procure an agreement from the appellee and his associates for the benefit of the persons owning or controlling the patent rights. At the time the representations were made by the appellant, it is alleged that he knew they were false, and that the patents were worthless and the stock of no value. The appellant was not, as he professed to be, a disinterested business man, seeking a safe and promising investment, but he was the secret agent and tool of third parties to dispose of their worthless property. Instead of engaging in the proposed venture upon the same terms and footing as the appellee, his notes were to be returned to him without payment, and he was to receive a bonus of \$1,000 for his services in inveigling his friends and neighbors. The conduct of the appellant, as set forth in the complaint, was fraudulent, and the contract thereby induced was voidable. The case made in the complaint is readily distinguishable from *Cook v. Churchman*, 104 Ind. 141. In the case at bar, nothing was said concerning the character, credit, conduct, ability, trade, or dealing of any person, but a conspiracy

was entered into by the appellant and others, the common purpose of which was to defraud the appellee and other citizens, and to obtain their notes and money.

Nor were the representations made by the appellant expressions of opinion, merely. The appellant stated that the patents were of great value; that for Clinton county alone they were worth \$25,000, but could be secured for \$12,500; and that he was anxious to join in the purchase. He declared, on his judgment as a business man and financier, that the stock of the proposed corporation would be more valuable than any bank-stock, and that its dividends would pay the notes executed by the appellee and his associates. These statements, it is averred, were made, with full knowledge of their falsity, for the purpose of inducing the appellee to execute his notes and join in the proposed undertaking. They were relied upon, and served the purpose for which they were intended. They purported to be founded upon the appellant's knowledge of the value of the patents, and in view of the standing and reputation of the appellant, and the business in which he was engaged, they were well calculated to deceive the appellee and the class of persons to whom they were made. In *Bish v. Beatty*, 111 Ind. 403, 407, it was held that a representation that certain notes were "as good as government bonds" was the statement of a fact. See, also, *Drake v. Grant*, 4 N. Y. Supp. 899.

It can not be said that the appellee had the opportunity to investigate the character and the value of the patents. Such an inquiry demanded peculiar skill and knowledge. It would have required time. It might have proved entirely fruitless. The advantages possessed by vendors of territorial rights under patents over intended purchasers have been recognized by the courts, and it has been held that the purchaser may rely upon the representations of the vendor, and that the rule of *caveat emptor* does not apply. *Iowa, etc., Heater Co. v. American, etc., Co.*, 32 Fed. 735, 739.

The views herein expressed concerning the effect of secret

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agreements securing special advantages and profits to agents and promoters of corporations are fully sustained by many authorities. *Western Union Tel. Co. v. Union, etc., R. Co.*, 3 Fed. 1; *Chandler v. Bacon*, 30 Fed. 538-540; *Davenport v. Buchanan*, 6 S. D. 376, 61 N. W. 47; *Walker v. Mobile, etc., R. Co.*, 34 Miss. 245; *Coles v. Kennedy*, 81 Iowa 360, 46 N. W. 1088, 25 Am. St. 503; *Tolman v. Smith*, 43 Ill. App. 562.

It is averred that the appellee paid his notes before his discovery of the fraud which had been practiced upon him. Payment under such circumstances could not operate as a ratification of the transaction. The fraud did not consist in the failure of the Clinton County Hedge & Wire Fence Company to make and sell its fences, but in the methods by which the appellee was induced to execute his notes and to become a stockholder in that corporation. It does not appear from the complaint that the appellee knew when he paid his notes, or that he had the means of knowing, that the appellant and others had conspired to cheat and defraud him, that the appellant understood that the patents were worthless, or that there was a secret agreement between the appellant and the persons interested in the sale of the territory covered by the patents that the appellant was not to pay his notes, and was to receive \$1,000 for disposing of the patent rights.

We are of the opinion that each paragraph of the complaint was sufficient, and that the court did not err in overruling the demurrers to them.

The reasons urged by counsel for appellant in support of the motion for judgment in favor of appellant on the answers of the jury to the questions of fact submitted to them are those assigned in argument to sustain the proposition that the facts stated in the complaint are not sufficient to constitute a cause of action, and what has been said upon that branch of the case renders further discussion unnecessary. For like reasons the objections to instructions num-

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bered one, two, and three given by the court are not well taken, and upon the same ground instruction numbered twelve, asked for by appellant, was properly refused.

The motion for a new trial was founded upon the same views of the evidence as were urged against the complaint, and which we have held erroneous. The assessment of damages was not too large.

We find no error. Judgment affirmed.

THE BRAZIL BLOCK COAL COMPANY v. GIBSON.

[No. 20,014. Filed March 20, 1903.]

MASTER AND SERVANT.—*Negligence.—Assumption of Risk.—Complaint.*

—A complaint for personal injuries caused by the attachments to a bucket used in hoisting dirt from a mining shaft in which plaintiff was at work giving away is not insufficient for want of facts on the ground that the defect was obvious and open to plaintiff, where it was alleged that the place where plaintiff was at work was so dark that he could not see the attachments, that he did not know what constituted a proper attachment, and that it was not his business to investigate. *pp. 320-325.*

SAME.—*Evidence.*—No error was committed in permitting a witness who worked in a mine in which plaintiff was injured to testify that he was unable to determine in the darkness whether a certain attachment to a bucket used in hoisting dirt, which gave way and injured plaintiff, was defective without making an actual examination thereof. *p. 325.*

EVIDENCE.—*Personal Injuries.*—Where in the trial of an action for personal injuries to plaintiff, while working in a mining shaft, caused by the alleged defective construction of a ring, used in attaching a bucket to a rope for hoisting dirt, defendant on cross-examination asked a witness for plaintiff the size, shape, and capacity of another bucket used in the mine, no error was committed in permitting plaintiff to show on re-examination of such witness, that the ring on the other bucket was welded, while the ring on the bucket which caused the injury was an open ring, the ends thereof overlapping. *p. 326.*

SAME.—*Personal Injuries.—Remedying Defective Appliance After Accident.*—Where in an action for personal injuries to plaintiff, while working in a mining shaft, caused by the alleged defective construction of a ring with which a bucket was attached to a rope, witnesses who saw the ring at different times testified differently as to its condition, evidence was properly introduced showing

160	319
164	542
160	319
168	263

160	319
169	21

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that after the accident the ring was changed by hammering its overlapping ends together. pp. 326, 327.

MASTER AND SERVANT.—Assumption of Risk.—Safety of Appliances.—Relative Duties.—Though a servant assumes all risks of which he knew, or of which, by the exercise of ordinary diligence, he could have known, and where the hazard is alike open to the observation of both, the master is not liable to the servant for injury resulting therefrom, yet the servant is not bound to search for defects, or make a critical inspection of the appliances that are provided for his use, but may rely upon the master's proper performance of his duty to furnish reasonably safe and proper appliances and properly to inspect the same, unless the defects are such as to be obvious to the servant while giving proper attention to the duties of his employment. pp. 327, 328.

From Clay Circuit Court; *P. O. Colliver*, Judge.

Action by James Gibson against the Brazil Block Coal Company for personal injuries. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

G. A. Knight, for appellant.

J. M. Rawley, T. W. Hutchison, A. W. Knight, S. D. Coffey and *S. M. McGregor*, for appellee.

MONKS, J.—This was an action brought by appellee to recover damages for personal injuries. The complaint was in three paragraphs. Appellant's demurrer to each paragraph for want of facts was overruled as to the first and third paragraphs, and sustained as to the second paragraph. The third paragraph was withdrawn by the appellee at the trial. The appellant filed a general denial. A trial of the cause by a jury resulted in a verdict in favor of appellee, on which the court, over appellant's motion for a new trial, rendered judgment for appellee.

The errors assigned and not waived are: (1) That the court erred in overruling the demurrer to the first paragraph of the complaint; and (2) that the court erred in overruling the motion for a new trial.

The first paragraph of the complaint alleges that appellant is a domestic corporation engaged in the business of

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mining coal in the counties of Clay and Parke, in this State; that on the 13th day of September, 1900, and for two or three months prior thereto, appellant, in prosecuting its business of mining coal, was engaged in sinking a shaft near the town of Caseyville, Parke county, Indiana; that said shaft was being formed by making a vertical excavation, and hoisting the accumulated earth to the surface; that on the foregoing date the work of excavating had proceeded to such an extent that the shaft was about eighty-six feet deep; that the loose earth that accumulated at the bottom of the shaft during the excavation was loaded into a large bucket that was lowered into said shaft and hoisted to the surface by an engine; that said bucket was made of iron, and was capable of holding about 1,500 pounds of earth at a load; that said bucket was furnished with a bail, which was attached to each side and somewhat below the middle of the bucket, so that when filled the bucket could be easily tipped, and the earth thus thrown from it; that said bucket was further equipped with a narrow strip of iron three or four inches long, called a "stub," which was welded to one side of the bucket near the top of the rim so that it extended two or three inches above the rim, near the bail and parallel with it; that, to prevent said bucket from tipping and spilling the earth that it contained while being hoisted to the surface, an iron ring was put on the handle or bail so that it could be placed over the stub before referred to, thus firmly to hold the bucket upright; that said bucket was lowered and hoisted by a rope and a hook attached to the bail, the rope connecting with the engine aforesaid; that said iron ring was not solid, the ends thereof not being welded but overlapping each other one or two inches.

It is further alleged that on said 13th day of September, 1900, and for some time prior thereto, appellee was in the employment of appellant, in sinking said shaft, as a common laborer; that on said day appellee was working at the

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bottom of said shaft, shoveling earth into said bucket; that appellee, with others working at the bottom of said shaft, had filled said bucket with earth, and the same had been hoisted to the top of the shaft, when suddenly, and without any warning, the iron ring referred to spread apart and became loosened from the iron stub round which it had been placed, thus causing the bucket to tip, and the earth it had contained to be precipitated down the shaft; that said bucket at this time contained about 1,500 pounds of earth, which in so falling struck the appellee on the head and the back, and that by reason thereof the appellee was greatly hurt and bruised; that by reason of said injuries he has lost two months of labor during which he could have earned \$100, and that he has expended \$200 for nurse hire, medicines, and medical attention in treating said injuries.

It is further alleged that said accident occurred because said ring was unfit and improper for the use to which it was put; that it was unfit because the ends overlapped, and were not solidly welded, thus permitting the ends thereof to spread, and to loosen the ring from round the stub; that said ring was old, rusty, worn, cracked, "and was too frail to resist the strain placed upon it;" that said ring had been constantly used for about twelve months, and on account of such long-continued use and its cracked condition it had become weak and unfit for use, and was not of an approved style, form, quality, and construction; that the appellant had knowledge of the defective condition of said ring, and its unfitness for use, or could have known thereof by the exercise of ordinary diligence, but negligently and carelessly used the same notwithstanding such defective and unfit condition; that the appellee had no knowledge whatever that said ring was unfit for use, unsafe, defective, and had been in use a long time, and was not of an approved style, quality, and construction, or that the same was cracked; that he had nothing whatever to do with the handling of said bucket and the adjusting of said ring on the stub; that he was

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wholly unfamiliar with such appliances, and was ignorant of the proper kind, quality, and construction of such rings as were used on this bucket, or of any other rings; that from the observations he had made of said ring it appeared to be amply safe and fit to do the work required of it, and that he noticed no defect therein, and supposed it a ring proper for the use to which it was put; that the appellee did his work at a great depth beneath the surface, and on account of the darkness did not have the opportunities and facilities to inspect said ring closely, but from what he observed he believed said ring to be welded, and was unable to observe any crack therein, and that he was compelled to rely upon the assurance that the appellant, in furnishing and providing said bucket and its equipments, had done its duty in furnishing appliances safe and proper for the work to be performed; that, if said ring had been sound, solid, and of proper kind, the said accident should not have occurred, and that said accident did occur solely because of the negligence of appellant in the particulars hereinbefore set forth, and that said accident occurred without any fault or negligence on the part of appellee. Wherefore, etc.

It is manifest that this paragraph of the complaint proceeds upon the theory that the appellant failed to discharge its duty as a master to use ordinary care to furnish to the appellee reasonably safe appliances with which to perform the labor required of him as a servant. It is argued by appellant that this paragraph is insufficient on demurrer for want of facts, on the grounds: (1) That the alleged defect in the ring was obvious; (2) that it was as open to the observation of the appellee as it was to the observation of the appellant, and that the appellee had, therefore, assumed the risk of the defective appliance.

It is very clearly alleged in this paragraph of the complaint that appellee had no knowledge whatever that said ring was defective or unfit for use; that appellee had nothing to do with the handling and adjusting of said ring; that

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he was wholly unfamiliar with such appliances; and that, because of the darkness in the shaft in which he worked, the appellee had no opportunity to inspect the ring closely to learn of its exact condition. While the general allegation that the servant had no knowledge of the defective condition of the appliance that the master furnished may not be sufficient where the complaint discloses, by the facts alleged, that the servant should have known of the defect producing his injury, it can not be said here that the facts alleged impair the force of the general allegation. We think the particular allegations reënforce the general one, and explain in detail why the appellee did not and could not know of the defective and unsafe condition of the ring. It does not appear from this paragraph that, in his circumstances, the defect was obvious to appellee; or that he, equally with the master, had opportunity to observe the defective condition of the ring. It was not a part of his work to handle the ring. The place in which he worked was dark so that he could not see the ring clearly. He did not know what constituted a proper ring. It was not his business to investigate. Appellee was the foreman of the men engaged in filling the buckets, and worked with them, and, so far as appears from the complaint, this work did not place him in a situation to know the nature of the appliances which caused his injury.

It is the duty of the master to exercise ordinary care in furnishing appliances reasonably safe and suitable for performing the work required of the servant. The duty is a continuing one, and the servant is authorized to rely on the master's having properly performed it. *Evansville, etc., R. Co. v. Duel*, 134 Ind. 156, 158; *Nall v. Louisville, etc., R. Co.*, 129 Ind. 260, 271; *Ohio, etc., R. Co. v. Percy*, 128 Ind. 197, 203; *Louisville, etc., R. Co. v. Quinn*, 14 Ind. App. 554, 557; 20 Am. & Eng. Ency. Law (2d ed.), 71, 73.

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The servant assumes the risks and hazards ordinarily incident to the employment which he undertakes; but he does not assume the increased risks and hazards of the master's negligence in furnishing unsafe and unsuitable appliances, unless the servant knew, or, what is the same, could have known by the exercise of ordinary diligence under the circumstances of the case, of the defective appliances, and of the danger attendant thereupon. *Wright v. Chicago, etc., R. Co.*, post, 583; *Wabash R. Co. v. Ray*, 152 Ind. 392, 399, 400; 20 Am. & Eng. Ency. Law (2d ed.), 123, 124. The trial court, therefore, did not err in overruling the appellant's demurrer to this paragraph of complaint for want of facts.

It is asserted that the court erred in permitting a witness for the appellee, who worked in the mine in which appellee was injured, to state in answer to a question by the appellee, that he was not able while at work at the bottom of the shaft to determine in the darkness whether the ring used was a welded or lap ring without making an actual examination thereof. The witness, before the evidence objected to was given, had stated that he was a day employe at the mine, working at the bottom of the shaft, shoveling earth; that he used a "bank lamp;" that "it wasn't light or it wasn't dark" in the shaft, and "was a little bit dark and a little bit light." It is a difficult matter, by mere description, to put a jury in the possession of accurate knowledge of the condition of the light in the mine. Whether the witness, who worked under substantially the same conditions as the appellee, could see the ring without an actual examination thereof, brought the matter more definitely and more accurately before the jury. It was not the statement of an opinion; it was the statement of a fact. This evidence was proper for the consideration of the jury in determining whether or not the defect in said ring was known to appellee, or could have been known in the exercise of ordinary

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care under the conditions in the mine while he was performing his duties in said shaft. The servant does not assume the risk of defects in appliances furnished not discoverable in the exercise of ordinary care. *Wabash, etc., R. Co. v. Morgan*, 132 Ind. 430, 446; *Louisville, etc., R. Co. v. Wright*, 115 Ind. 378, 384, 7 Am. St. 432; *Louisville, etc., R. Co. v. Howell*, 147 Ind. 266, 270, 271.

Appellant insists that the court below erred in permitting the witness William Snow, for the appellee, to testify, on reëxamination, that a welded ring was used on the other bucket employed in raising the earth from the same shaft in which appellee was injured. The ground of objection at the trial was that this evidence was immaterial, because this bucket was not in controversy. Appellant's counsel, on cross-examination of this witness, inquired into the size and capacity of this bucket, its shape and the material of which it was made. Having done this, it can not complain that appellee was permitted to inquire into other like matters of its construction and equipment, including the character of the ring used thereon. Appellant opened the door for this evidence, and can not be heard to object to the same even if it was immaterial as claimed—a question we do not decide. *Wabash Printing, etc., Co. v. Crumrine*, 123 Ind. 89, 94, 95; *Perkins v. Hayward*, 124 Ind. 445, 449, and cases cited; *Blough v. Parry*, 144 Ind. 463, 483, and cases cited; *Ewbank's Manual*, §255.

It is objected that the court erred in permitting Harvey Bramblett, a witness for the appellee, to testify that after the accident he, with another, hammered the laps of the ring together and hooked the bucket up so that it could be taken off the truck and out of the way. Witnesses who testified to having seen the ring at different times after the accident, testified differently as to its condition when seen. It was proper, therefore, for appellee to show that its condition had been changed before certain witnesses saw it, and it was immaterial whether it had been changed by appel-

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lant's agents or by a stranger. The material question was whether, at the time certain witnesses testified to having seen it, it was in the same condition that it was in immediately after the injury. The doctrine of agency has no application. The court did not err in receiving this evidence.

There was no error in permitting the witness James Walters, for the appellee, to state that frequently the buckets in being hoisted would strike against the sides of the shaft. The construction of the bucket which caused the injury and the manner of operating it were matters necessary to be considered in determining the issues in this cause. It was proper, therefore, to prove the manner in which the buckets were hoisted and lowered in said shaft, and, if they struck against the sides of the shaft on being hoisted or lowered, such fact was clearly not "immaterial."

The evidence of this witness that he never noticed any difference between the management of the appellant's shifts, ^{error} if it could be said to have been erroneously received, ^{was} immaterial and could not have been prejudicial to ap-

^{Appellant}

Objections are made to the evidence of other witnesses, but **such** objections are waived by appellant's failure to **argue** here the grounds of its objections presented below. **Musser v. State**, 157 Ind. 423, 430, 431, and cases cited.

Objection is made to the giving of the seventh, thirteenth, ^{four}teenth, fifteenth, and twenty-first of the instructions, concerning the employe's assumptions of risks, and the master's duty to furnish reasonably safe appliances, and to **inspect** the same, asked by the appellee. It is insisted that **these** instructions are not relevant to the issues or applicable to the evidence, and are in conflict with other instructions given. It is true that a servant assumes all risks of which **he** knew, or of which, by the exercise of ordinary diligence, **he** could have known (*Pennsylvania Co. v. Ebaugh*, 152 Ind. 531); and where the hazard is alike open to the

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observation of both, the master is not liable to the servant for injury resulting therefrom. *Wabash R. Co. v. Ray*, 152 Ind. 392; *Louisville, etc., R. Co. v. Kemper*, 147 Ind. 561. "An employe is required to observe and avoid all known or obvious perils, even though they may arise from defective machinery and appliances; but he is not bound to search for defects, or make a critical inspection of the appliances that are provided for his use. These are the duties of the employer." *Cincinnati, etc., R. Co. v. McMullen*, 117 Ind. 439, 10 Am. St. 67; *Ohio, etc., R. Co. v. Percy*, 128 Ind. 197. It thus being the duty of the master to furnish reasonably safe and proper appliances, and properly to inspect the same, the servant may rely upon the duty having been performed, unless the defects are such as to be obvious to the servant while giving proper attention to the duties of his employment. *Louisville, etc., R. Co. v. Buck*, 116 Ind. 566, 573, 2 L. R. A. 520, 9 Am. St. 883; *Bradbury v. Goodwin*, 108 Ind. 286, 290; *Louisville, etc., R. Co. v. Howell*, 147 Ind. 266, 270, 271; *Bailey*, Per. Inj., §802.

Whether, under the evidence, the alleged defect in the ring was obvious, or whether the appellee knew, or by the exercise of ordinary care should have known, of it, and appreciated the risks and hazards on account thereof, were questions properly submitted to the jury under appropriate instructions. *Diezi v. G. H. Hammond Co.*, 156 Ind. 583; *Bailey*, Master's Liability, 188-190; *Wood*, Master & Servant (2d ed.), §366, and notes. The instructions mentioned, when construed with the other instructions given, are not open to the objections urged, and the instructions as a whole correctly and fairly presented the law of the case to the jury. There was no error, therefore, in the giving of said instructions.

It is contended, also, that the verdict of the jury is not sustained by sufficient evidence, and that it is contrary to law. It is well settled that this court can not weigh the

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evidence, and, where there is evidence in support of the general verdict, which sustains it on all the material issues, the verdict will not be disturbed on appeal. *National State Bank v. Sanford, etc., Co.*, 157 Ind. 10, 15; Ewbank's Manual, §46. After carefully reading the evidence, we are not prepared to say that it does not sustain the verdict, or that the verdict is contrary to law.

Judgment affirmed.

THE WABASH RAILROAD COMPANY v. ENGLEMAN.

[No. 20,017. Filed March 31, 1903.]

INJUNCTION.—Threatened Trespass.—Complaint.—Evidence.—In a suit to enjoin a railroad company from entering upon and enclosing with a fence a strip of land, the complaint alleged that plaintiff and his grantors have been in open, notorious, and exclusive possession of the land for more than twenty years and that defendant is threatening to enclose same with a fence, and that said threatened occupation of the land is in derogation of the rights of plaintiff, and if not prevented, will work irreparable damage to him. No averments are made showing the nature of the damage, nor is it shown that the trespass will be continued so as to afford a foundation for a claim of title by adverse possession. The evidence showed that the land in controversy had formerly been covered by a gravel pit, and was of little value, and if an intention to fence it was shown, it was not disclosed that, under the circumstances, the fence would be of any special damage to plaintiff. *Held*, that a complete and adequate remedy at law existed in favor of plaintiff; that the complaint was not sufficient on demurrer, and that the court erred in awarding a perpetual injunction upon the evidence given in the case.

From Wabash Circuit Court; *H. B. Shively*, Judge.

Suit by Marquis L. Engleman to enjoin the Wabash Railroad Company from entering upon and inclosing a strip of land with a fence. From a decree in favor of plaintiff, defendant appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Reversed*.

E. P. Hammond, *W. V. Stuart*, *D. W. Simms* and *J. D. Conner, Jr.*, for appellant.

John Mitchell and *W. B. McClintic*, for appellee.

160	329
163	339
163	339
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164	318
164	319
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160	329
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JORDAN, J.—This action was instituted by appellee to enjoin appellant railroad company from entering upon and enclosing with a fence a strip of land of about thirteen acres situated in Wabash county, Indiana, near to appellant's right of way. The trial court upon the verified petition granted a temporary injunction restraining appellant, together with its servants and employes, from trespassing upon or interfering with the plaintiff's possession of the described real estate. Issues were joined between the parties on the complaint and answer, and on the final hearing the court found in favor of the plaintiff, and awarded him a perpetual injunction, from which decree or judgment this appeal is prosecuted.

The errors assigned and relied upon for a reversal relate to overruling the demurrer to the complaint, and in denying a motion for a new trial.

Counsel for appellant argue that the judgment below should be reversed upon the grounds: (1) Insufficiency of the complaint on demurrer; (2) that the evidence is not sufficient to sustain the finding awarding a perpetual injunction, for the reason that it appears that appellant only threatened to commit a mere trespass upon the land in question, for which appellee would have an adequate remedy at law.

The complaint is in one paragraph, and therein it is alleged that the plaintiff is the owner and in possession of the described premises; that he and his grantors have been in the open, notorious, and exclusive possession of the land in dispute, exercising acts of ownership thereover, for more than twenty years last past. The complaint then charges: "That said defendant company is threatening to and is about to enclose said tract of ground, commencing on the west line of said fractional quarter section, on the north line of the defendant's land, six rods from its right of way, thence running eastwardly 1,300 feet with the right of way of said company, and thirty feet wide, in a northerly and

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southerly direction, immediately north of the said right of way, and to exclude the plaintiff from the possession of the same, all without right; that the company has had said strip of land surveyed, and has placed stakes marking the boundary of the ground which it threatens to enclose, and has instructed its employes to build a fence around said strip; that said threatened occupation by said defendant of said land is in derogation and violation of the right of plaintiff, and, if not prevented, will work irreparable damage to him; that said defendant's employes are ready so to fence said land and to exclude plaintiff from possession, and, if not at once by this court prevented, will have the same fenced before notice can be given and an application for an injunction heard in this court." The complaint concludes with a prayer for a temporary injunction, restraining appellant from in any manner fencing or trespassing upon said land, and that on final hearing the railroad company be perpetually enjoined from in any manner claiming ownership or possession of said land, and that plaintiff's title thereto be quieted as against the defendant.

The complaint only professes to state a cause of action for an injunction, and if the facts therein averred are not sufficient to entitle plaintiff to such relief, it is certainly insufficient for any other purpose. It is a well settled proposition that not every trespass will entitle the injured party to relief by the extraordinary remedy of injunction, for the rule is elementary and where there is a complete or adequate remedy at law for the wrong complained of, a court of equity will not interpose, but will leave the complainant to seek relief through the proper or appropriate legal remedy. Therefore, by virtue of this rule, an action for an injunction can not be successfully maintained to restrain or prevent the commission of a mere trespass, unless it is made to appear that the injury apprehended therefrom will be great or irreparable, and consequently can not be adequately compensated in an action for damages against the tres-

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passer. This principle has been recognized and well affirmed by many decisions of this court, among which are the following: *Miller v. Burket*, 132 Ind. 469, and cases there cited; *McQuarrie v. Hildebrand*, 23 Ind. 122; *Indianapolis Rolling Mill Co. v. City of Indianapolis*, 29 Ind. 245.

Section 1162 Burns 1901 of our statutory law pertaining to injunctions authorizes the granting of an injunction where it is made to appear that the plaintiff is entitled to the relief demanded, and that such relief, or any part thereof, consists in restraining the commission of some act, the commission or continuance of which would produce great injury to the plaintiff. The construction placed upon this statute by the decisions of this court is that it does not warrant an injunction in cases where the commission of the act can be readily and fully compensated in damages, and where there are no reasons to apprehend a multiplicity of suits on account of the wrong as threatened. *Clark v. Jeffersonville, etc., R. Co.*, 44 Ind. 248; *Indianapolis Rolling Mill Co. v. City of Indianapolis, supra*; *Whitlock v. Consumers Gas Trust Co.*, 127 Ind. 62.

Of course, the right to invoke the jurisdiction of a court of equity must depend upon the peculiar or particular facts in each case, and one of the questions to be decided is whether the legal remedy under the particular circumstances of the case is adequate, or, in other words, is such remedy as practicable and efficient to promote the interests of justice and its prompt administration as is the remedy in equity? *Denny v. Denny*, 113 Ind. 22; *Champ v. Kendrick*, 130 Ind. 549; *Allen v. Winstandly*, 135 Ind. 105; *Xenia Real Estate Co. v. Macy*, 147 Ind. 568.

The authorities affirm that the inadequacy of the legal remedy is the very foundation or indispensable prerequisite for the interposition of a court of equity, for the plain or evident reason that inasmuch as the law has provided a complete or adequate remedy for the redress of the particular

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wrong, therefore a court of chancery is not authorized to interpose its prerogative. The strict rule, however, as expressed by Chancellor Kent in *Jerome v. Ross*, 7 Johns. Ch. 315, 11 Am. Dec. 484, that in order to entitle a complainant to an injunction to restrain the commission of a trespass it must be a strong and peculiar case of trespass going to the destruction of the inheritance, or where the mischief is remediless, has been to an extent relaxed by modern or later decisions of the higher courts. Pomeroy, Eq. Jurisp. (2d ed.), §1357. The general rule, as asserted, is that in order to give a court of equity the right to enjoin a wrong about to be committed against or upon the property of another, in addition to the fact that the threatened injury must be of such a nature as not to be susceptible of complete pecuniary compensation, the title of the complaining party to the property must be admitted or established by legal adjudication. Pomeroy, Eq. Jurisp. (2d ed.), §252; High, Injunctions (3d ed.), §701. At the close of the last-cited section the author says: "If the title to the *locus in quo* is in doubt, the injunction, if allowed at all, should only be temporary until the title can be determined at law." The reason for this doctrine is because, as a general rule, a court of equity will not try disputed titles to land. Pomeroy, Eq. Jurisp. (2d ed.), §252. But exceptions, however, have been made to this general rule, and there is authority for asserting that when the aggrieved party is in possession of the premises, although his title thereto is in dispute and has not been established by law, if, under the particular circumstances, irreparable injury will result from the threatened wrong or trespass, an injunction will be awarded. High, Injunctions (3d ed.), §698.

By the principles to which we have referred, so far as they are applicable, the sufficiency of the facts in this case may be tested, in order to determine whether appellee is entitled to the extraordinary remedy which he seeks. The complaint, as previously shown, discloses that the threat-

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ened trespass will consist in the acts of appellant entering upon the strip of ground in controversy and enclosing it with a fence. The charge is made that the railroad company has instructed its employes to build a fence around the premises. The averment made in the complaint that the threatened occupation of the land is in derogation and violation of the rights of the plaintiff is more in the nature of a recital of that fact than a positive averment thereof. The pleading, as stated, closes with the allegation, "That said defendant's employes are ready so to fence said land and exclude plaintiff from possession;" but as to whether or not, in so doing, these servants or employes will be acting upon their own responsibility, or under and in pursuance of instructions or directions on the part of appellant, is not positively shown, but appellant's connection with the apprehended expulsion of the plaintiff is left to be conjectured or surmised. That a wrong or a trespass is about to be committed by the servant or employe of another is not, alone, sufficient to render the master liable or responsible therefor, unless it appears that the employe is acting under the master's directions or instructions, or within the scope of his employment. *Pittsburgh, etc., R. Co. v. Adams*, 25 Ind. App. 164; *Wabash R. Co. v. Linton*, 26 Ind. App. 596.

In the construction of a pleading the rule is well settled that no facts will be presumed to exist in favor of the pleader which have not been averred or alleged, as it may be presumed that a party's pleading is as strong in his favor as the facts will warrant. The complaint, when accorded the full force and effect of the facts therein properly alleged, certainly shows that nothing beyond a mere trespass is threatened to be committed upon the premises in controversy. The mere charge is made that if such trespass is not prevented by the court appellee will suffer irreparable damage; but, aside from this general or bare aver-

ment, there are no facts set out to show to the court that the great or irreparable mischief or damage apprehended by the plaintiff will necessarily result if the threatened wrong is carried into effect. Nothing in addition to the naked charge of irreparable damage is set out to show that the strip of ground in question is of any peculiar or particular use or value to the plaintiff, and that therefore, by reason of the fence which appellant threatens to construct thereon, its value, use, or enjoyment by the plaintiff will be in any manner impaired or affected, to an extent that pecuniary compensation for the damages suffered or sustained will not be adequate. Neither is it positively shown that the trespass in question will be continued so as to afford appellant a foundation for a claim of title by adverse possession. The rule is that, when an injunction is invoked to restrain a threatened trespass, the facts showing the great or irreparable damage or mischief apprehended should be set out in the complaint or petition, as a bare averment to that effect will not alone suffice, unless supported by a proper averment of facts. This is essential in order to enable the court to judge of the necessity for an injunction. In view of the severity or harshness of the remedy by injunction, a strict adherence to this rule of pleading is required. *Centerville, etc., Turnpike Co. v. Barnett*, 2 Ind. 536; 10 Ency. Pl. & Pr., 925, 926, 950, 954; High, *Injunctions* (3d ed.), §722.

There is no averment in the complaint of the insolvency of the defendant, nor is such fact established by the evidence. While it is true that the insolvency of a trespasser is not, alone, sufficient to give a court of chancery jurisdiction to enjoin his tortious acts in a case where there is an absence of other necessary facts, still insolvency is an important element or factor in determining the question of the inadequacy of the relief afforded by an action at law, or, in other words it affords an additional reason to justify a court of equity to interfere, as the inability of the wrongdoer to

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respond in damages renders the legal remedy ineffectual. *McQuarrie v. Hildebrand*, 23 Ind. 122; *Champ v. Kendrick*, 130 Ind. 549; High, Injunctions (3d ed.), §717.

As appellee, in his prayer for relief, among other things, asks that his title be quieted against the defendant, it would seem, therefore, that the purpose of this action is to settle a disputed question of title between the parties. If appellant is asserting or claiming any unfounded title to the premises in question, adverse to appellee, the law furnishes an appropriate and adequate remedy to settle and determine such controversy. On the trial it was, by agreement between the parties, admitted that the predecessor of appellant became the legal owner of the strip of ground in dispute in 1854, and that appellant is still the legal owner thereof, unless its title has been divested by adverse possession on the part of appellee. The greater portion of the evidence introduced by appellee upon the trial was to establish a title to the land in him, as against appellant, by twenty years of adverse possession. The evidence shows that a portion of the ground in controversy had formerly been covered by a gravel-pit which appellant had used for the purpose of obtaining gravel, but this gravel-pit, as it appears, had not been used for a number of years prior to the beginning of this action. The evidence of appellee further discloses that the land is of little value for any purpose whatever; that all that appellant did previous to the beginning of this action was to cause a survey to be made of the land, and to put down some small stakes, the latter being placed from 100 to 300 feet apart, marking the boundaries of the strip of land. The most of these stakes had been plowed up by appellee. Some of appellant's employes said they were going to build a fence, and did construct one on another piece of ground, not the property, however, of appellee. This fence was constructed to a point within 200 feet of the strip of land in question. No fence posts were placed on the ground in dispute; nor did

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the surveyor in setting the small stakes place them entirely around the premises. If it be conceded that the evidence shows that appellant was intending to enclose the land in question by a fence, there is nothing to disclose that, under the circumstances, the fence so constructed would be of any special damage to appellee. There is evidence to disclose that appellee's grantor is the real party prosecuting this action, and that he is doing so in the name of appellee in order to have the title to the premises which he professed to convey to appellee confirmed and settled in this action. In fact it may be said that the entire scope of the evidence goes to show that the object of the suit is to settle the question of disputed title between the parties. An injunction, as we have shown, is not as a general rule, the proper remedy for such purpose. Upon any view of the case, we are of the opinion that, under the circumstances, it appears that appellee has a complete and adequate remedy at law for any injury which he may suffer or sustain by reason of the threatened trespass, and is therefore not entitled to the extraordinary remedy of injunction.

We conclude that the complaint is not sufficient on demurrer, and that the court erred in awarding a perpetual injunction upon the evidence given in the case. The judgment is therefore reversed, and the cause remanded to the lower court, with instructions to grant appellant a new trial, and to sustain the demurrer to the complaint.

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160	838
160	386
160	338
168	674

**STREET v. THE VARNEY ELECTRICAL SUPPLY
COMPANY.**

[No. 19,802. Filed April 1, 1903.]

CONSTITUTIONAL LAW.—Minimum Wage Law.—Work and Labor.—The minimum wage law (§§7055a, 7055b Burns 1901), fixing a minimum rate of wages to be paid unskilled labor employed upon any public work of the State, counties, cities, and towns, is unconstitutional, being violative of §1 of the fourteenth amendment of the federal Constitution and also §§1 and 23 of article 1 of the state Constitution.

From Wayne Circuit Court; *H. C. Fox*, Judge.

Action by Frank L. Street against the Varney Electrical Supply Company. From a judgment for defendant, plaintiff appeals. *Affirmed.*

S. C. Whitesell, for appellant.

R. T. MacFall, *M. W. Hopkins* and *Wilfred Jessup*, for appellee.

DOWLING, J.—The only question for decision on this appeal is the constitutionality of the act of March 9, 1901 (Acts 1901, p. 282, §§7055a, 7055b Burns 1901), commonly called the minimum wage law. It is raised by a demurrer to the complaint for want of facts, and the ruling of the court sustaining the same.

The material averments of the complaint are these: The appellee the Varney Electrical Supply Company is a private domestic corporation; the city of Richmond is a municipal corporation organized under the general laws of this State; between October 1, 1901, and January 16, 1902, the appellee was engaged in constructing, as one of the public works of said city, an electric light plant, to be used in lighting the public streets, highways, and other public places of said city; the said work was done under a contract between the Varney Electrical Supply Company and the said city of Richmond; the appellant during said

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period performed work and labor as an unskilled laborer at the request of the appellee the Varney Electrical Supply Company by digging holes in which to place the poles of the electric light plant, and in shaving poles; he so labored for 540 hours, and was entitled to receive twenty cents per hour for such labor; the Varney Electrical Supply Company refused to pay him twenty cents per hour, on the ground that the statute fixing the minimum wages for such labor at that rate was unconstitutional, and the appellant was paid fifteen cents an hour for his said labor; upon these facts the appellant demands judgment for \$54, the penalty given by the statute, and \$300 for his attorney's fees.

The statute upon which the action is founded is as follows: "Section 1. That from and after the passage of this act, unskilled labor employed upon any public work of the State, counties, cities, and towns, shall receive not less than twenty cents an hour for said labor, which may be enforced in a proper action, and in case a suit shall be necessary for the recovery of the compensation herein provided for, and where the compensation is recovered, the person suing shall recover also a reasonable attorney's fee, together with a penalty not exceeding double the amount of wages due: Provided, that boards of commissioners, common councils of towns or cities are prohibited from making contracts with such laborers by the week, or any definite length of time wherein a price is agreed upon at a rate less than as provided herein. Section 2. Any contractor or other person in charge of public work of the State, counties, cities or towns, whose duty it is to contract with, employ and pay the unskilled labor on such public work, who shall violate the provisions of §1 of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not exceeding \$10, to which may be added imprisonment in the county

jail not exceeding thirty days." §§7055a, 7055b Burns 1901.

Some of the objections taken to the statute by the appellee are that it unlawfully abridges the privileges and immunities of the citizen; that it deprives persons of liberty and property without due process of law; that it denies to a large class of citizens the equal protection of the law; that it grants to a class of citizens privileges and immunities which, upon the same terms, do not equally belong to all citizens; and that it impairs the obligations of contracts. All these objections are founded upon the provisions of the federal and state Constitutions, and it is insisted by the appellee that the act is therefore unconstitutional and void. These propositions are denied by the appellant. He claims that the statute does not restrict the liberty of contract, and that its enactment was a legitimate exercise of the police power of the State.

The provisions of the Constitution of the United States alleged to be violated by the statute are those contained in §1 of the fourteenth amendment, which prohibits the State from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, and from depriving any person of life, liberty, or property without due process of law, or denying to any person within its jurisdiction the equal protection of the law. The provisions of the state Constitution supposed to be involved here are found in §1, article 1, which declares that all men are endowed with certain unalienable rights, and that among them are life, liberty, and the pursuit of happiness; and in §23, article 1, which forbids the granting by the General Assembly to any citizen or class of citizens of privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

The act of March 9, 1901 (Acts 1901, p. 282), undertakes to fix the minimum rate of compensation to be paid to a particular and limited class of laborers employed upon

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any public work of the State, counties, cities, and towns, without regard to the actual value of such labor, or the rate paid by other persons, natural or artificial, for the same kind of labor in the same vicinity. It prohibits boards of commissioners and common councils of cities from making contracts with unskilled laborers by the week, or for any definite length of time, wherein a price is agreed upon at a rate less than the compensation fixed by the statute. Its restrictions reach beyond the State, counties, cities, and towns, and extend to any contractor or other person in charge of any public work whose duty it is to contract with, employ, and pay any unskilled laborer employed on such work. It not only imposes a penalty, but punishes by fine and imprisonment any contractor or other person in charge of public work of the State, counties, cities, or towns, whose duty it is to employ and pay unskilled labor on such public work, who contracts with any unskilled laborer for a rate of compensation for his services less than twenty cents per hour. It is not contended, and it could not be maintained, that the restrictions in this act upon the right of contract would be valid if the act applied to the work and affairs of private citizens. Even if no express provision of any constitution forbade such legislative interference with the right of contract, it would be void for the reason that the authority to fix by contract the prices to be paid for property, including human labor, is not ordinarily within the domain of legislation. But such enactments are also held to be in violation of §1, article 1, of the state Constitution; securing to every citizen of the State the inalienable right to personal liberty and to the pursuit of happiness.

But it is argued in support of the validity of the act that no specific provision of the federal or state Constitution inhibits this species of legislation, and that counties, cities, and towns are mere political and municipal subdivisions of the State, through which the government is administered. It is said that the State has the power to fix the salaries of

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its officers, and the wages it will pay to its agents and employes; therefore it has the right to declare what rate of wages shall be paid to the agents and employes of a county, city, or town employed upon any public work.

While the counties, cities, and towns are political and municipal subdivisions of the State, they are not governmental agencies in such sense as to subject the management of their local affairs, involving the making of contracts for labor and materials to be used upon local improvements, and the payment for the same out of the revenues of the county, city or town, to the arbitrary and unlimited control of the legislature. They are corporations as well as political and governmental subdivisions and agencies, and, as such corporations, they have the power to make contracts by which the rate of compensation for property sold to them is fixed. With regard to such contracts for the purchase of property or the employment of labor, counties, cities, and towns stand much upon the same footing as private corporations; and they can not be compelled by an act of the legislature to pay for any species of property more than it is worth, or more than its market value at the time and in the place where it is contracted for. The power to confiscate the property of the citizens and taxpayers of a county, city, or town, by forcing them to pay for any commodity, whether it be merchandise or labor, an arbitrary price, in excess of the market value, is not one of the powers of the legislature over municipal corporations, nor the legitimate use of such corporations as agencies of the State. If an act compelled counties, cities, and towns to pay to all stone masons not less than \$2 per perch for stone to be used on any public work, when the market price of stone was but \$1.50 per perch, or to the brickmaker not less than \$12 per thousand for brick, when brick of the same quality could be bought for \$10 per thousand, or to the hardware merchant not less than six cents per pound for iron, when iron of the same quality could be had for four cents per

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pound, such legislation would shock every reasonable mind, and would be universally condemned as unwarranted and unconstitutional. For the same reasons, an act fixing the price of unskilled labor on all public works at not less than twenty cents an hour is a legislative interference with the liberty of contract by counties, cities, and towns, which finds no sanction or authority in the doctrine that counties, cities, and towns are municipal and political subdivisions of the State.

In the very recent case of *People, ex rel., v. Coler*, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. 605, the court of appeals of New York, in considering the question, said,—O'Brien, J., delivering the opinion of the court: "The legislature does not possess unrestricted power to bind a city hand and foot with respect to all its local business affairs. It can not fix by statute the price which it must pay for materials or property that it may need, or the compensation that it must pay for labor or other services that it may be obliged to employ, at least when such regulations increase the cost beyond that which it would be obliged to pay in the ordinary course of business. If it could do all these things, it could virtually dispose of all the revenues of the city for such purposes as it thought best, and local self-government would be nothing but a sham and a delusion. * * * The right which is conceded to every private individual and every private corporation in the state to make their own contracts and their own bargains is denied to cities and to contractors for city work; and, moreover, if the latter attempt to assert such right the money earned on the contract is declared to be forfeited to the city without the intervention of any legal process or judicial decree. The exercise of such a power is inconsistent with the principles of civil liberty, the preservation and enforcement of which was the main purpose in view when the constitution was enacted. If the legislature has power to deprive cities and their contractors of the right to

agree with their workmen upon rates of compensation, why has it not the same power with respect to all private persons and all private corporations? That question can be answered in the language which this court used when a case with features somewhat similar was under consideration: 'Such legislation may invade one class of rights to-day and another to-morrow, and if it can be sanctioned under the constitution, while far removed in time we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed and the reaping of grain, and governmental ordinances regulated the movements and labors of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions.' *In re Jacobs*, 98 N. Y. 98.

* * * The power to deprive master and servant of the right to agree upon the rate of wages which the latter was to receive is one of the things which can be regarded as impliedly prohibited by the fundamental law upon consideration of its whole scope and purpose as well as the restrictions and guaranties expressed."

In discussing the proposition that the several municipal governments of the state are not in themselves independent and sovereign, but are subdivisions of the general government, created by it with enumerated powers, and possessing none except such as may be fairly drawn from their charters, the supreme court of Ohio, in *City of Cleveland v. Clements Bros., etc., Co.*, 67 Ohio St. 197, 65 N. E. 885, said: "The fallacy of this contention lies in the assumption that the compulsory authority of the legislature over municipal corporations is so absolute and arbitrary that it may dictate the specific terms upon which such municipality shall contract, and may prescribe what stipulations and conditions its contracts shall contain, although such contracts may, as in this case, relate only to matters of pure-

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ly local improvement. This is a misapprehension of the legislative authority, for no such right or power has been delegated to, or is possessed by, the general assembly."

The liberty to contract, subject only to such limitations as may be imposed by the legislature in the legitimate exercise of the police power for the public welfare, is not only secured by the Constitution of this State, but is undoubtedly within the protection of the federal Constitution also, and is covered by the fourteenth amendment thereof, which provides that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Const. U. S., 14th Amendment, §1; *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34; *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253; *Hooper v. California*, 155 U. S. 648, 662, 15 Sup. Ct. 207, 39 L. Ed. 297; *Bailey v. People*, 190 Ill. 28, 60 N. E. 98, 54 L. R. A. 838, 83 Am. St. 116; *Kuhn v. Common Council*, 70 Mich. 534, 38 N. W. 470; *People v. Rosenberg*, 138 N. Y. 410, 416, 34 N. E. 285; *People, ex rel., v. Coler*, 166 N. Y. 1, 21, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. 605; *Palmer v. Tingle*, 55 Ohio St. 423, 45 N. E. 313. Corporations, both private and public, are entitled to the benefit of this provision for the preservation and protection of their right to make contracts affecting their local affairs. *In re Tiburcio Parrott*, 1 Fed. 481; *Butchers' Union, etc., Co. v. Crescent City, etc., Co.*, 111 U. S. 746, 764, 4 Sup. Ct. 652, 28 L. Ed. 585; *Blythe v. State*, 4 Ind. 525; *Board, etc., v. Pollard*, 153 Ind. 371; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819.

If the legislature has the right to fix the minimum rate of wages to be paid for common labor, then it has the power to fix the maximum rate. And if it can regulate the price of labor, it may also regulate the prices of flour, fuel, mer-

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chandise, and land. But these are powers which have never been conceded to the legislature, and their exercise by the State would be utterly inconsistent with our ideas of civil liberty. Among the most odious and oppressive laws ever enacted by the English parliament, in the worst of times, were the statutes of labor of Henry VI and Edward IV. These enactments fixed a maximum rate of wages for the laboring man, prohibited him from seeking employment outside of his own country, required him to work for the first employer who demanded his services, and punished every violation of the statutes with severe penalties. In the very nature and constitution of things, legislation which interferes with the operation of natural and economic laws defeats its own object, and furnishes to those whom it professes to favor few of the advantages expected from its provisions. The circumstances that the act of March 9, 1901 (Acts 1901, p. 282) reverses the conditions of the statutes of labor of Henry VI and Edward IV, and lays the burden and the penalty upon the employer instead of the laborer, does not render it any less pernicious and objectionable as an invasion of natural and constitutional rights. Statutes similar to this have been before the courts of other states, and in nearly every instance have been held unconstitutional. *People, ex rel., v. Coler, supra*; *State, ex rel., v. Norton*, 5 Ohio N. P. 183; *Commonwealth v. Perry*, 155 Mass. 117, 28 N. E. 1126, 14 L. R. A. 325, 31 Am. St. 533; *Ramsey v. People*, 142 Ill. 380, 32 N. E. 364, 17 L. R. A. 853; *Jones v. Great Southern, etc., Hotel Co.*, 79 Fed. 477; *State v. Julow*, 129 Mo. 163, 31 S. W. 781, 29 L. R. A. 257, 50 Am. St. 443; *Shaver v. Pennsylvania Co.*, 71 Fed. 931; *Atkins & Co. v. Town of Randolph*, 31 Vt. 237; *Palmer v. Tingle*, 55 Ohio St. 423, 45 N. E. 313; *City of Cleveland v. Clements Bros., etc., Co.*, 67 Ohio St. 197, 65 N. E. 885.

The statute of March 9, 1901, is obnoxious to the further objection that through its operation a citizen may be de-

prived of his property without due process of law. If the minimum price to be paid by municipal subdivisions of the State for unskilled labor on public works exceeds the rate at which such labor can be obtained by other persons at the same place, then the excess so paid for labor on public improvements is taken from the citizens assessed for such works, not by due process of law, but by a mere legislative fiat. The citizens of the State, who must, through assessments made upon their property, pay for the public works of counties, cities, and towns, are entitled to have such work done at such rate of wages as the local agents and official representatives of such municipal subdivisions of the State may be able to secure by contract. They can not be required arbitrarily to pay higher wages than laborers employed on private works or improvements in their particular district demand, any more than they could be compelled by similar legislation to pay a minimum rate of wages to laborers employed by them in their private business. If the minimum rate fixed by the statute exceeds the market value of such wages, the excess is a mere donation exacted under color of law from the citizens liable to assessment for the public improvement, and bestowed upon the unskilled laborer. Public revenues can not be applied in this way. *McClelland v. State, ex rel.*, 138 Ind. 321; *State, ex rel., v. City of Indianapolis*, 69 Ind. 375, 35 Am. Rep. 223; *Warner v. Curran*, 75 Ind. 309.

Lastly, we think the statute obnoxious to the objection of class legislation. In fixing the minimum rate of wages to be paid for unskilled labor to be employed by counties, cities, and towns, on public improvements, a classification is made which is unnatural and unconstitutional. The laboring men of the State may, for some purposes, constitute a class concerning which particular legislation may be proper. This classification has been recognized and sustained in statutes requiring the payment of wages in lawful money of the United States, forbidding the assignment of

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future and unearned wages, and in similar acts. But no legal and sufficient reason can be assigned for placing unskilled labor in a class by itself for the purpose of fixing by law the minimum rate of wages at which it shall be employed by counties, cities, and towns on their public works. Why exclude the skilled mechanic from the benefit of the act? Why compel the payment of a higher rate of wages to the unskilled laborer than may be demanded by the skilled mechanic for more difficult and important work, requiring special training, experience, and a higher degree of intelligence? Unless the legislature has the power to fix the minimum rate of wages to be paid by counties, cities, and towns to carpenters, stone-masons, bricklayers, plumbers, and painters employed on local improvements, treating each trade as a separate class, it has not the power to enact laws fixing the compensation of unskilled laborers employed on similar works. No sufficient reason has been assigned why the wages of the unskilled laborer should be fixed by law and maintained at an unalterable rate, regardless of their actual value, and that all other laborers should be left to secure to themselves such compensation for their work as the conditions of supply and demand, competition, personal qualities, energy, skill, and experience, may enable them to do.

After the most careful and thorough examination of all the questions of law presented by the demurrer in this case, we are satisfied that the ruling of the lower court was not erroneous, and its judgment is therefore affirmed.

Jordan and Gillett, JJ., upon the facts, concur in the result.

INTERNATIONAL TEXT-BOOK COMPANY v. WEISSINGER ET AL.

[No. 19,822. Filed November 25, 1902. Rehearing denied April 1, 1903.]

CONSTITUTIONAL LAW.—*Work and Labor.—Assignment of Wages.—Master and Servant.*—The act of 1899 (Acts 1899, p. 198, §§7059, 7059c Burns 1901), prohibiting the assignment by employes of future wages, is not unconstitutional as placing an unreasonable restraint upon the right of a citizen to contract in violation of §1, article 1, of the state Constitution, or that it deprives any person of property without due process of law in violation of §1 of the fourteenth amendment of the federal Constitution.

From Clark Circuit Court; *J. K. Marsh*, Judge.

Action by the International Text-Book Company against Horace L. Weissinger and another. From a judgment for defendant, plaintiff appeals. *Affirmed.*

J. W. Fortune, S. N. Chambers, S. O. Pickens and C. W. Moores, for appellant.

M. Z. Stannard, for appellees.

DOWLING, J.—The appellant (formerly the Colliery Engineer Company, but afterwards, by change of name, the International Text-Book Company) sued the appellees, Horace L. Weissinger and the American Car & Foundry Company, upon an order alleged to have been executed by the said Weissinger, and accepted by the said American Car & Foundry Company, of which the following is a copy:

“June 7, 1899. To the American Car & Foundry Company: Please pay the Colliery Engineer Company of Scranton, Pa., proprietors of the International Correspondence Schools, the sum of \$2 per month, from such wages as may be due me, until the total sum of \$61.25 is paid them for a complete architectural course, purchased by me. First payment on this order to be made from money due on next pay-day succeeding date of this order. Horace L.

Weissinger. Occupation: Carpenter. Address: New Albany, Indiana. Shops employed in: * * * Underwhom employed: F. Kahler. Paymaster: W. C. Ruddell. Name and title of official to whom this order is to be sent for collection."

A demurrer to the complaint was sustained upon the ground that the instrument which was the foundation of the action was, in legal effect, an assignment of future wages to become due to the appellee Weissinger from his co-appellee the American Car & Foundry Company, and was in violation of §§1 and 4 of an act of the legislature of this State approved February 28, 1899 (Acts 1899, p. 193, §§7059, 7059c Burns 1901), which are in these words: "Section 1. That every person, company, corporation or association employing any person to labor, or in any other service for hire, shall make weekly payments for the full amount due for such labor or service, in lawful money of the United States to within six days or less of the time of such payment; but if, at any time of stated payment, any employe as aforesaid shall be absent from his regular place of labor or service, he shall be paid in like manner thereafter on demand: Provided, that this act shall not apply to any employe engaged by a common carrier in interstate commerce. * * * Section 4. The assignment of future wages, to become due to employes from persons, companies, corporations or associations affected by this act, is hereby prohibited, nor shall any agreement be valid that relieves said persons, companies, corporations or associations from the obligation to pay weekly the full amount due, or to become due, to any employe in accordance with the provisions of this act: Provided, that nothing in this act shall be construed to prevent employers advancing money to their employes."

The appellant refusing to amend its complaint, judgment was rendered for the appellees. The ruling on the demurrer is the error assigned.

For the reversal of the judgment, counsel rely upon two propositions, which are thus stated in their brief: "(1) Assignments of future wages to be earned are held to be valid and legal contracts by the weight of authority of the courts of this country. (2) Sections 1 and 4 of chapter 124 of the acts of 1899 (Acts 1899, p. 193) are unconstitutional for the reason that they prohibit and limit the right of a citizen of Indiana to make contracts in violation of article 1, §1 of the bill of rights of the Constitution of the State of Indiana, and of §1 of the fourteenth amendment to the Constitution of the United States."

The writing referred to in the complaint, although in form an order for the payment of money, operated as an assignment of the wages mentioned in it. *Gray v. Trafton*, 12 Mart. (La.) 702; *Daves v. Haywood*, 22 N. C. 313. For the purposes of this case, it may be admitted that assignments of future wages to be earned are valid contracts, provided they are not prohibited by a statute which the legislature has the constitutional authority to enact. This qualified admission leaves for decision only the question of the constitutional validity of the two sections above set out. If it can be said that these sections contain unreasonable restraints upon the liberty of the citizen, or that they deprive any person of property without due process of law, then they fall within the express prohibition of §1, article 1, of the Constitution of this State, or of §1 of the fourteenth amendment of the Constitution of the United States.

These sections do, unquestionably, limit and restrict in a very marked degree the liberty of the citizen to enter into contracts which, in the absence of the statute, he would have the right to make. By §4 he is absolutely disabled from making an assignment of future wages to be earned by him. Such a prohibition can be sustained only on the ground that some public interest is involved, and that it is of such a character as to render it a legitimate subject of legislative regulation or control. The wages of laborers

have been the subject of legislative solicitude and action in this State for many years, and in a great variety of forms. The stockholders of corporations, organized for manufacturing or mining or chemical purposes, were made individually liable for all debts due and owing laborers, servants, and apprentices for services rendered, without limit as to the amount of such debts. To all other creditors of the corporation, such stockholders were liable only to an amount equal to the stock held by them respectively. 1 R. S. 1852, p. 360, §11.

By the act of August 24, 1875 (Acts 1875, s.s., p. 29, §5077 Burns 1901), the stockholders of every company organized to carry on any kind of manufacturing or other business authorized by that act were declared to be individually liable for all debts due and owing to laborers, servants, apprentices, and employes for services rendered such corporations, although not liable for other debts to any amount except to the extent of the stock subscribed by them.

Individual liability of the stockholders of railroad companies to laborers for work done in the construction of such roads was created by the general railroad act of 1852, and was afterwards affirmed or extended by later statutes. 1 R. S. 1852, p. 421, §38, p. 423, §10; Acts 1865, s.s., p. 120, §38; §§5198, 5231 Burns 1901.

Wages to an amount not exceeding \$50, due to any employe for work and labor performed within two months of the death of a decedent, were made a preferred claim against the estate by the act of 1881. Acts 1881, p. 423, §2534 Burns 1901, §2378 R. S. 1881.

So, too, the wages of each employe to an amount not exceeding \$50 earned within the preceding six months, are made a preferred claim where the property of the employer is seized on mesne or final process, or the business is suspended by the action of creditors, or put into the hands of any assignee, receiver, or trustee. §7051 Burns 1901. In certain cases they are exempted from attachment, garnish-

ment, or proceedings supplementary to execution. §§970-972 Burns 1901.

The act of March 3, 1885 (Acts 1885, p. 36), made debts for manual or mechanical labor a preferred claim against all persons and corporations when the property of the debtor passed into the hands of an assignee or receiver, and they were required to be paid in full before the payment of any other debts excepting claims for the costs and expenses of the proceedings.

Many other statutes might be mentioned, but those referred to sufficiently indicate the importance of the subject of wages in the estimation of the legislature, and the variety of cases in which attempts have been made to protect the interests of the wage-earner. The reasons for such legislative supervision and control are readily found in the number and situation of ordinary laborers and employes. According to the last census, the number of wage-earners employed in manufacturing and mining industries alone in this State was 155,956. The amount of wages paid to them annually is stated at \$66,847,317. The census report is but partial and imperfect, as a large number of companies and corporations, engaged in manufacturing and mining, failed to make the returns required from them. No statistics are furnished by the census of the number of wage-earners employed in other occupations besides those of manufacturing and mining. The figures herein stated are sufficient, however, to show how large a portion of the citizens of this State fall within the classification of wage-earners. A large proportion of the persons affected by these statutes of labor are dependent upon their daily or weekly wages for the maintenance of themselves and their families. Delay of payment or loss of wages results in deprivation of the necessities of life, suffering, inability to meet just obligations to others, and, in many cases, may make the wage-earner a charge upon the public. The situation of these persons renders them peculiarly liable to imposition and injustice

at the hands of employers, unscrupulous tradesmen, and others who are willing to take advantage of their condition. Where future wages may be assigned, the temptation to anticipate their payment, and to sacrifice them for an inadequate consideration, is often very great. Such assignments would, in many cases, leave the laborer or wage-earner without present or future means of support. By removing the strongest incentive to faithful service,—the expectation of pecuniary reward in the near future,—their effect would be alike injurious to the laborer and his employer. It is clear that the object of the act of 1899, *supra*, was the protection of wage-earners from oppression, extortion, or fraud on the part of others, and from the consequences of their own weakness, folly, or improvidence. We can not say that no just ground existed for such legislative interference for so commendable a purpose.

The disability imposed by the act of 1899, *supra*, is similar to that which renders married women incompetent to bind themselves or their property by contracts of suretyship. §6964 Burns 1901. It does not differ in its nature from those humane rules of the law which make void agreements before judgment to waive the benefit of exemption laws, and of laws providing for a stay of execution, or regulating the rights of the parties under mortgages on household goods. *McLane v. Elmer*, 4 Ind. 239; *Maloney v. Newton*, 85 Ind. 565, 44 Am. Rep. 46; *Hancock v. Yaden*, 121 Ind. 366, and cases cited on pp. 369, 370, 6 L. R. A. 576, 16 Am. St. 396; *Zumpfe v. Gentry*, 153 Ind. 219.

In Cooley, Const. Lim. (6th ed.), 744, in an enumeration of some of the cases in which the police power of the State may be exercised without transcending the limits of constitutional authority, the author says: "So, for the protection of laborers against the oppression of employers, it is held competent to forbid their being paid in anything else than legal tender funds." A decision to this effect was made by this court in *Hancock v. Yaden*, *supra*.

In a very recent case in the Supreme Court of the United States, an act of the legislature of the state of Tennessee requiring the redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages due to employes was held valid. In the course of its opinion the court said: "But it is also true that, inasmuch as the right to contract is not absolute in respect to every matter, but may be subjected to the restraints demanded by the safety and welfare of the state and its inhabitants, the police power of the state may, within defined limitations, extend over corporations outside of and regardless of the power to amend charters. *Atchison, Topeka & Santa Fe Railroad v. Matthews*, 174 U. S. 96." *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 22, 22 Sup. Ct. 1, 46 L. Ed. 55.

If the legislature, in the exercise of its general police power, to secure the safety and welfare of the State may deprive the laborer and his employer of the right to contract for the payment of wages in anything else than legal tender notes or other lawful money, we do not perceive why it may not, also, in the exercise of that power prohibit the assignment of wages before they are earned. The reason and public necessity are as clear and cogent in the one case as in the other. The purpose of the legislation in each is to protect a large and important class of citizens from imposition, unfair dealing, and the consequences of their own improvidence. The act of February 28, 1899 (Acts 1899, p. 193), applies equally to all citizens, and is not subject to the objection of a partial or improper classification. The sections before us do not extend to wages which have been earned, but merely suspend the right to dispose of wages by assignment until they are earned. They render void an agreement into which no prudent man, ordinarily, would wish to enter.

The court did not err in sustaining the demurrer to the complaint. Judgment affirmed.

KUHN v. THE AMERICAN MUTUAL LIFE INSURANCE COMPANY.

[No. 20,042. Filed April 2, 1903.]

APPEAL AND ERROR.—*Parties.*—Unless all parties adverse to appellant in the court below are made appellees in this court, the case can not be determined on its merits.

From St. Joseph Circuit Court; *W. A. Funk*, Judge.

Action by William J. Kuhn against the American Mutual Life Insurance Company and others. From a judgment in favor of defendants, plaintiff appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Appeal dismissed.*

J. D. Osborn, R. M. Johnson and *Robert Lowry*, for appellant.

J. M. Van Fleet and *V. W. Van Fleet*, for appellee.

MONKS, J.—Appellant brought this action against appellee and five others. Each of said defendants, in the court below, filed a demurrer to each paragraph of the complaint for want of facts, which was overruled. Said defendants filed an answer in six paragraphs. Appellant filed a demurrer to each paragraph of said answer, for want of facts, which was overruled. Appellant then filed his reply in seven paragraphs. The cause was tried by the court, and a special finding of facts made and conclusions of law stated thereon against appellant and in favor of appellee and its codefendants in the court below. Final judgment was rendered by the court that appellant take nothing by his said action, and that the “defendants recover of the plaintiff their costs and charges in this cause laid out and expended.”

Six defendants recovered final judgment against appellant in the court below, and he has made only the American Mutual Life Insurance Company, one of said defendants, an appellee in this court. It is settled law in this State

180	356
168	400
180	356
1167	76
180	356
1170	549

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that, unless all parties adverse to appellant in the court below are made appellees in this court, the case can not be determined on its merits. *Kreuter v. English Lake Land Co.*, 159 Ind. 372, and cases cited.

The appeal is therefore dismissed.

SEFTON v. BOARD OF COMMISSIONERS OF HOWARD COUNTY ET AL.

[No. 19,929. Filed April 2, 1903.]

HIGHWAYS.—Improvement.—County Lines.—Statutes.—Repeal by Implication.—The act of 1889 (Acts 1889, p. 433, §6792 *et seq.* Burns 1901) for the construction and improvement of county-line highways is not repealed by the act of 1899 (Acts 1899, p. 468, §6914 *et seq.* Burns 1901), though the subject-matter of the acts is the same and many of the provisions contain the same language.

From Howard Circuit Court; *W. W. Mount*, Judge.

Suit by William W. Sefton against the board of commissioners of Howard county and others, to enjoin the enforcement of a highway assessment. From a judgment for defendants, plaintiff appeals. *Affirmed.*

J. C. Herron and *F. J. Byers*, for appellant.

W. R. Oglebay and *F. S. Oglebay*, for appellees.

GILLET, J.—This action was instituted by appellant to enjoin the enforcement of a special assessment levied against his land pursuant to the provisions of the act of March 11, 1889 (Acts 1889, p. 433, §6792 *et seq.* Burns 1901). A demurrer was sustained to the complaint, and final judgment rendered in favor of appellees.

Counsel for appellant contend that the act mentioned was repealed by implication by the act of March 6, 1899 (Acts 1899, p. 468, §6914 *et seq.* Burns 1901), and it is admitted that if the former act is still in force the complaint is insufficient.

The subject-matter of the two acts is the same; both authorize the construction and improvement of county-line

160	357
161	430

160	357
170	491
170	622

highways. The later act is affirmative in its terms. Many of its provisions contain the same language as the former act, thus showing that it was drafted, and presumably considered by the General Assembly, with the first act in mind, but the later enactment does not contain a repealing clause. There are, however, some marked differences between the two acts, notably in that the first act provides for the levying of special assessments against real estate, based on special benefits, in districts comprehending all the real estate within two miles of such improvements, while the later act provides for the submission of the proposition to a vote of the townships, and contemplates the levying of a general tax in such townships.

Can it be said that in these circumstances there has been a repeal by revision? Repeals by implication are not favored. The courts, however, only seek the legislative will in determining whether there has been a repeal, and the conclusion that there was such a purpose may follow from a revision, if it appears that the subsequent statute was intended to prescribe the only rule that is to govern respecting the subject-matter. *Tracey v. Tuffly*, 134 U. S. 206, 10 Sup. Ct. 527, 33 L. Ed. 879; *Sutherland*, Stat. Const., §154; 23 Am. & Eng. Ency. Law, 487.

Two affirmative statutes, without inconsistent provisions, may run in parallel lines, and the courts will incline, in the absence of a provision for a repeal, to regard the later enactment as merely cumulative or auxiliary, unless it appears that the object as well as the subject-matter of the two enactments is the same. *United States v. Claflin*, 97 U. S. 546, 24 L. Ed. 1082; 23 Am. & Eng. Ency. Law, 482, and cases cited.

We have before us two provisions for the construction and improvements of highways in certain cases. The undertaking is public in its character. In the first statute the legislature has in effect declared that, where the circumstances mentioned in that act exist, the real estate within

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the district is to be deemed as so far specially benefited as to warrant the levying of special assessments. In the later statute the legislature has provided that, when the project has received the sanction of a majority of the voters of a presumably larger taxing district, the general power to tax for that purpose may be invoked. Either method of raising revenue for such a purpose may be admissible, and the choice of methods, at least in the outline, is a matter within the legislative discretion. Cooley, Taxation (2d ed.), 638. See, also, *Heick v. Voight*, 110 Ind. 279; *Board, etc., v. Harrell*, 147 Ind. 500.

We perceive no reason for holding that the act of 1889 was repealed by the act of 1899. If the legislature may authorize the laying out and improving of highways by either method, no good reason exists why it may not grant a choice of such methods to the parties who institute the proceedings. If they elect to adopt the first method, they must bring themselves within the limitations that the earlier act contains; if they proceed under the later statute, the project must receive the sanction of a majority vote of the townships in interest.

A substantial reason for not repealing the first act is to be found in the fact that in many instances the benefits to be derived from the improvement would be so far limited in respect to territory that the proposition could not reasonably be expected to receive the approval of a majority of the voters in the townships bordering upon the improvement. But we need not look to even this extent within the field of legislative discretion, for it is enough to affirm, in view of the presumption against an implied repeal of the earlier act, that "there is here a legal way—a way both possible and practicable, and neither unusual nor unreasonable—in which the two statutes may be upheld, and that is, by adjudging that two different systems were created." *Robinson v. Rippey*, 111 Ind. 112, 116.

Judgment affirmed.

160	360
160	438

160	360
161	109
162	561

160	360
168	573

160	360
170	269
170	272

**PITTSBURGH, CINCINNATI, CHICAGO AND ST.
LOUIS RAILWAY COMPANY v. GIPE,
ADMINISTRATRIX.**

[No. 19,708. Filed January 16, 1908. Rehearing denied April 2, 1908.]

MASTER AND SERVANT.—*Employers' Liability Act.*—*Railroads.*—*Locomotive Engineers.*—A cause of action exists under the fourth subdivision of the employers' liability act (§7083 Burns 1901) for the injury of a locomotive engineer caused by the negligence of another locomotive engineer in the common service. pp. 361, 362.

COMPROMISE AND SETTLEMENT.—*Executors and Administrators.*—*Damages.*—*Death by Wrongful Act.*—*Railroad Relief Association.*—Where a widow who was administratrix of her husband's estate and beneficiary in a railroad relief fund certificate upon the life of her husband, which provided that the acceptance of benefits from the relief fund should operate as a release of all claims for damages against the railroad company, accepted the amount of the death benefit certificate and signed a receipt as widow and beneficiary, also as administratrix, in full satisfaction of all claims and demands against the relief association and railroad company on account of the death of the deceased, such receipt pleaded in answer to an action by the administratrix against the railroad company for the death of decedent constituted *prima facie* a bar, not only to the claim of the widow, but also to a recovery for the benefit of the children of the deceased. pp. 362-368.

SAME.—*Executors and Administrators.*—*Damages.*—*Death by Wrongful Act.*—The provisions of §§2454, 2456 Burns 1901, relative to the collection and compounding of debts by an administrator do not apply to the compromise of a demand made by an administrator for the death of his decedent by wrongful act, and the administrator in such case may compromise the claim without order of court. pp. 368-374.

From Hamilton Circuit Court; *J. F. Neal*, Judge.

Action by Flora J. Gipe, administratrix of the estate of Sylvester H. Gipe, deceased, against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Reversed.*

J. L. Rupe, W. R. Hough, George Shirts and W. R. Fertig, for appellant.

Pittsburgh, etc., R. Co. v. Gipe.

W. J. Beckett, I. W. Christian, W. S. Christian, B. K. Elliott, W. F. Elliott and F. L. Littleton, for appellee.

GILLETT, J.—Flora J. Gipe, as administratrix of the estate of Sylvester H. Gipe, deceased, instituted this action against appellant and the Pennsylvania Company to recover damages for the alleged negligent killing of her decedent. Appellee voluntarily dismissed the action as against the Pennsylvania Company. Appellant demurred to the amended complaint for want of facts, its demurrer was overruled, and it excepted to such ruling, and assigns error thereon. On issues duly joined, there was a trial that resulted in a verdict and judgment for appellee. Appellant unsuccessfully moved for a new trial, and the further questions in this case are presented by an assignment of error based on the latter ruling.

It is sought by the amended complaint to make a case within the first portion of the fourth subdivision of the employers' liability act (§7083 Burns 1901). But two objections are urged to such pleading: (1) Because deceased and the alleged negligent fellow servant were, at the time of the death of the former, engaged in the performance of duties as locomotive engineers, it is claimed that they were vice-principals, and that the statute does not impose a liability in such cases; and (2) that the condition of certain tracks, in the switch yard where decedent met his death, in respect to their crossing at an angle so acute as not to leave sufficient room for clearance for some distance on either side of the crossing, is shown to have been one of the assumed risks of the employment. We know of no reason why the statute should not be construed as creating a liability as between vice-principals. But we deny that it appears that these employees were vice-principals. Appellant's counsel, in their brief, speak of them as fellow servants, and the only basis for the claim that they were vice-principals appears to be the statement in some of our decisions that in cases

Pittsburgh, etc., R. Co. v. Gipe.

falling within the first part of the fourth subdivision of said statute the negligent employe is to be regarded as a vice-principal. See *Thacker v. Chicago, etc., R. Co.*, 159 Ind. 82, and cases cited. We need not pause to determine whether such statement would justify itself in every state of circumstances that might arise under that portion of the statute; it suffices to state that while the statutory provision has created a greater responsibility upon the part of the master, it has not operated to create a merely artificial relation that can be made the basis for refinements that would tend to impair the force of the enactment.

The second objection to the amended complaint is answered by the statement that the charge of negligence is not based on the situation of the tracks, but that the pleading is based on a charge of negligence upon the part of an engineer in the common service. If there are further objections to the statement of the cause of action, they stand as waived in this court by a failure to discuss them.

We pass now to a question that was presented under the issues based on the second paragraph of answer. The pleading mentioned stated, in substance, the following facts: That appellant was a party to an agreement among certain railroad companies whereby a so-called voluntary relief department was organized for the payment of fixed benefits to employes of said companies and their beneficiaries; that said department was maintained by the contributions of employes becoming members thereof, supplemented by the contributions of such companies, by virtue of a provision in said contract to meet all deficiencies in the fund; that decedent became, and was at the time of his death, a member of said department, under a contract based on an application containing the following provisions: "And I agree that the acceptance of benefits from said relief fund, for injury or death, shall operate as a release of all claims for damages against said company, arising from such injury or death, which could be made by or through me, and that

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I or my legal representatives will execute such further instrument as may be necessary formally to evidence such acquittance." The answer further shows that the regulations of said department, that are made a part of the contract by the terms of the application, provide that if suit be brought for such injury or death, payment shall not be made of such benefit until the suit is discontinued, and that if such suit result in a judgment against the company, or be compromised by it, that payment of such judgment or of the amount of the compromise shall preclude any claim upon the relief fund for such injury or death. It is also alleged in said answer that the beneficiary named by decedent in his application was his wife, Flora J. Gipe, and that, with knowledge of the facts aforesaid, she was appointed and qualified as administratrix of decedent's estate, and that, with such knowledge, she afterwards elected for herself, as beneficiary, and as said administratrix, to claim and demand from said relief fund the death benefit so provided, and that thereupon there was paid to her, as such administratrix, the amount of said death benefit, in the sum of \$750, and that, as such administratrix, she signed and executed a full release and discharge of said relief fund and of said Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, which release and discharge was in the following words: "Whereas, Sylvester H. Gipe, deceased, lately in the service of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, was a member of the relief fund of the said company, under application No. 5,561, and the death benefit payable from the said relief fund on account of such membership, amounting to \$750, is, upon the condition of the execution of this release, as provided in said application, payable to the undersigned, beneficiary of the deceased, under the terms of his application. Beneficiary: Flora J. Gipe (widow). Now, therefore, I, the undersigned, do hereby acknowledge that the payment of the said sum of \$750 from the relief department and fund

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of the said company, which sum I acknowledge to have this day received, is in full satisfaction and discharge of all claims or demands on account of or arising from the death of said deceased, which I now have, or can hereafter have, whether against the said relief fund, the said Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, or any other corporation associated therewith in administration of their relief department. Witness my hand and seal at Indianapolis, Indiana, this 28th day of January, A. D. 1898. (Signed) Flora J. Gipe (L. S.). (Signed) Flora J. Gipe, Adm. (L. S.)"

A third paragraph of answer was filed, by which appellant answered the facts alleged in said second paragraph of answer, in bar only of the claim of the widow. The appellee replied to the special paragraphs of answer in two paragraphs,—general denial, and no consideration. The court instructed the jury, upon the close of the argument, that there could be no award of damages in favor of the widow, so we need not consider that feature of the case further. The court refused, however, to give a peremptory instruction to find for the defendant, and modified an instruction tendered by appellant, by adding these words: "But if as to the children of said deceased, such release, executed by said Flora J. Gipe, was without any consideration moving to or received for them in her trust capacity, the same would only bar the right of recovery for said Flora for her individual benefit, but would not bar a recovery for the benefit of said children."

The appellant's evidence in support of the averments of the second paragraph of its answer consisted largely of the various documents heretofore mentioned in connection with our statement of the contents of said paragraph. The appellee offered no evidence in support of her reply, and the questions presented with reference to whether the defense on this branch of the case was made out will be discussed as we proceed.

In *Pittsburgh, etc., R. Co. v. Moore*, 152 Ind. 345, 44 L. R. A. 638, this court held that an answer substantially like the third paragraph of answer in this case, answering only as to the damages of the widow, was sufficient. It was in that case pointed out that while a beneficiary in such a case is at liberty to seek the statutory remedy, yet if he accepts the sure and immediate benefit of the fund, instead of taking his chances in the courts against the company, the result, at least while the contract stands, is a release of his claim for the tort. To the same effect see *Pittsburgh, etc., R. Co. v. Hosea*, 15 Ind. 412; 51 Cen. L. J. 143. It can not be denied that a release by a widow, who is the beneficiary, is not a release as to the next of kin, who have a right under the statute to share in the damages notwithstanding the stipulation of the decedent. In this case, however, the question is presented differently, for here the instrument of release was signed by the beneficiary and the administratrix. This leads us to an examination of the power of the latter to compromise.

At common law an executor or administrator had the same power over the personal estate of his decedent that the latter had at the time of his death. *Farr v. Newman*, 4 T. R. 621, note a, page 625; *Weyer v. Second Nat. Bank*, 57 Ind. 198; *Latta v. Miller*, 109 Ind. 302, 311; *Parker v. Providence, etc., Steamboat Co.*, 17 R. I. 376, 22 Atl. 284, 23 Atl. 102, 33 Am. St. 869, 14 L. R. A. 414, and cases cited. His power to compromise has been often affirmed. *Williams, Executors* (7th Am. ed.), *815; *Parker v. Providence, etc., Steamboat Co.*, *supra*; *Chase v. Bradley*, 26 Me. 531; *Chouteau v. Suydam*, 21 N. Y. 179; *Rogers v. Hand*, 39 N. J. Eq. 270, note.

In *Underwood v. Sample*, 70 Ind. 446, it was held that an executor might, upon a new and valuable consideration, extend the time of payment of a note. In *Latta v. Miller*, *supra*, this court held that upon a sufficient consideration an administrator might release one of the makers of a note,

the act not amounting to a *devastavit*. In deciding the case this court said: "The only restraint upon the common law rights and powers of an executor or administrator, in or over promissory notes and other evidences of debts, belonging to the decedent's estate, is imposed not by statute in this State, but by the decisions of this court."

Section 2454 Burns 1901 provides that: "Every executor and administrator shall proceed with diligence to collect the debts and demands due the estate of the deceased," and that, "where the interests of the estate may be promoted thereby, the court, or judge thereof in vacation, may order the executor or administrator to compound debts." Section 2456, *supra*, is as follows: "Where any debtor of a deceased person shall be unable to pay the whole or any part of the demand or claim of such person, or is insolvent or in doubtful circumstances; or where any legal or equitable defense is alleged against such debt or claim, the executor or administrator, with the approbation of the proper circuit court, or judge thereof in vacation, may compound with such debtor, and give him a discharge, upon receiving the avails agreed upon in such compounding or upon the payment of the same being sufficiently secured." The next section (2457) authorizes executors and administrators, with the approbation of the court, to "file" such debts or demands "in said court, for the benefit of the creditors, heirs, and legatees of such deceased." If the demand here in question, were within the description of the class of demands mentioned in the decedent's act, we might have a different question to deal with. But the provisions of said act do not apply to the compromise of a demand of this nature. The supposed restrictive provisions of said act clearly relate to debts and demands in favor of the estate of the deceased. The right of action that is given for wrongfully causing the death of another is regarded, not as a continuation of the right of the deceased, but as a new cause of action existing in favor of the beneficiaries mentioned in the

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statute. *Burns v. Grand Rapids, etc., R. Co.*, 113 Ind. 169; *Hilliker v. Citizens St. R. Co.*, 152 Ind. 86; *Pittsburgh, etc., R. Co. v. Hosea*, 152 Ind. 412; *Malott v. Shimer*, 153 Ind. 35, 74 Am. St. 278. As said in *Louisville, etc., R. Co. v. Goodykoontz*, 119 Ind. 111, 113, 12 Am. St. 371: "We know of no principle or precedent which sustains a recovery of damages for the death of a human being, no matter how caused, simply for the purpose of enhancing the value of the decedent's estate. The action is given to afford compensation for those who have sustained pecuniary loss by the death, and not for the benefit of the decedent's estate." These considerations point to the fact that the power of an executor or administrator to compromise a demand of this nature is not restrained by the decedent's act. As entirely in point on this proposition, we cite *Washington v. Louisville, etc., R. Co.*, 34 Ill. App. 658, where it was said: "The remaining ground upon which appellant seeks to reverse the judgment of the circuit court is, that plaintiff had not the power to make the agreement. In support of this proposition, appellant relies upon §83, Chap. 3, Starr & Curtis, 226. This section requires an administrator to secure an order of probate court, authorizing him to settle or compound claims due the estate, before he can legally proceed to do so. Does this section apply to cases like the one at bar? As we construe the statute under which this suit is brought, the claim sought to be enforced here is not a debt due to the estate. When recovered, the amount of the recovery does not become assets in the hands of the administrator to be distributed, as the other assets of the estate," "but the amount recovered shall be for the exclusive benefit of the widow and next of kin of such deceased person." The creditors of the estate of the deceased have no interest whatever in the amount of such recovery. Section 83 of the statutes in relation to the administration of estates, is applicable alone, as we view it, to claims due the estate, and which, when collected, belong to the estate, as assets, appli-

cable to the payment of debts of the estate." See, also, *Stuber v. McEntee*, 142 N. Y. 200, 36 N. E. 878.

If the person whom the statute authorizes to bring the action be regarded as acting in his capacity as executor or administrator, then, there being no restriction upon his authority to compromise in a case of this kind, by virtue of the decedent's act, we may affirm his authority on common law grounds, since the common law, except as provided otherwise, is a part of the law of this State. §236 Burns 1901. If, on the other hand, he be regarded as a statutory trustee, his right to compromise may be affirmed as an incident to his power to sue, and because of the general control that he must necessarily have over the action.

We proceed now to an examination of the decisions as to the authority of the person who brings the action to compromise. In *Henchey v. City of Chicago*, 41 Ill. 136, it was said: "Neither can we agree with appellant's counsel in the position that the plaintiff had no power to make the stipulation by which the suit was dismissed. The statute vested in her, as administratrix, the right of action and the legal title to whatever damages were recoverable. This, of necessity, gave her the legal right to control the prosecution and disposition of the suit, as an administrator has in other cases. Whether the children who, with herself, were interested in the distribution of whatever damages might have been recovered, can call her to account for any error of judgment she may have committed in making this settlement, is a question to be decided when they make the attempt." This ruling was followed in *Washington v. Louisville, etc., R. Co.*, 136 Ill. 49, 26 N. E. 653; *McIntyre v. Sholty*, 139 Ill. 171, 29 N. E. 43; *Brink's Express Co. v. O'Donnell*, 88 Ill. App. 459. In the carefully considered case of *Parker v. Providence, etc., Steamboat Co.*, 17 R. I. 376, 22 Atl. 284, 23 Atl. 102, 33 Am. St. 869, 14 L. R. A. 414, a like conclusion was reached. Under the Tennessee statute the widow has the right to sue, but the recovery

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is for the benefit of the children as well, as held in one of the earlier cases in that state. Under such circumstances her power to compromise, even over the objection of the children, has been a number of times affirmed. *Greenlee v. Railroad Co.*, 5 Lea 418; *Stephens v. Nashville, etc., Railway*, 10 Lea 448; *Holder v. Railroad*, 92 Tenn. 141, 20 S. W. 537, 36 Am. St. 77.

In the case last cited, where the children brought a somewhat anomalous action to recover against the original defendant their share of the money due under a compromise, where the money had been paid to the widow, the court, after referring to the earlier decisions in that state affirming the right of the widow to compromise, said: "The power to compromise the statutory right of action for all persons concerned carried with it, as a necessary consequence, a right on her part to receive for them the whole sum stipulated in the compromise. If the fact that the statute confers upon the widow the first right to sue, authorizes her to fix, by agreement, the aggregate amount to be paid by the wrongdoer to her and the children, it also authorizes her to receive that amount for herself and them. Her *bona fide* compromise binds the children, and her *bona fide* receipt of the money paid under the compromise, likewise, and for the same reason, binds them."

In Mississippi, under a statute substantially like the Tennessee statute, a widow made an agreement to compromise a pending suit to recover for the wrongful killing of her deceased husband. Her right so to do was challenged in *Natchez Cotton Mills Co. v. Mullins*, 67 Miss. 672, 7 South, 542, where the supreme court of that state said: "The widow alone had the right of action, and she had the right to accept satisfaction, and discharge the defendant."

In *Cogswell v. Concord, etc., Railroad*, 68 N. H. 192, 195, 44 Atl. 293, the court, after pointing out the common law authority of executors and administrators to com-

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promise, said: "An administrator in very many similar cases is appointed for the express purpose of bringing suit. The plaintiff, having the power to enforce this claim, may properly release it. Indeed, where there is no want of good faith in giving a release, it is difficult to see how any question of authority can arise. The fact that this is not a common law action does not affect the right of the administrator to compromise the claim, acting in good faith. In this, as in all other actions prosecuted by him in his capacity as administrator, he is the sole trustee for all persons interested in the suit."

A very full and satisfactory discussion of the subject under consideration is found in *Foot v. Great Northern R. Co.*, 81 Minn. 493, 84 N. W. 342, 83 Am. St. 395, 52 L. R. A. 354, where the question is discussed from the standpoint of the executor or administrator being a statutory trustee. In that case the action was brought for damages under the statute; there was an answer of compromise, and a reply that the compromise pleaded was made without the knowledge or consent of the next of kin, and without the knowledge or consent of the probate court; that such settlement had never been ratified or confirmed by the next of kin or the court, and that the administratrix had never rendered any account of the money so received, but had converted the same to her own use. A demurrer was sustained to this reply, and in passing on the ruling the court said: "It will be noticed that the reply does not attack the settlement pleaded in the answer upon the ground that it was procured through fraud or misrepresentation. The only issue raised by the reply is that the former administratrix, Ellen Flanning, had no authority to make the settlement. The demurrer, therefore, raises the question whether, under G. S. 1894, §5913, the personal representative of the deceased person has power, without the assent of the next of kin and the probate court, to compromise a claim for damages. The right of action given under this

statute is exclusively for the benefit of the widow and next of kin, upon the theory that they have a pecuniary interest in the life of the deceased, and the object of the statute is to compensate them for such loss. * * * Neither does it follow that no compromise or settlement could be made by the trustee, either before or after commencing the action. If the personal representative is the trustee of the parties to be benefited, for the purpose of commencing the suit, it must follow that he is their trustee for all purposes in connection with the action. Upon him devolves the responsibility of selecting counsel, collecting evidence, and incurring the expenses of a trial. Someone must determine the advisability of accepting a verdict as final, either because adverse or inadequate. Again, for the same reason, if the nature of the evidence attainable and the circumstances of the case should lead the personal representative to the conclusion that the chances of recovery would be slight, and that a compromise would be desirable without commencing the action, he has the same authority to effect a settlement before as after actually serving the summons. The statute contemplates that the entire matter of enforcing the claim and of collecting the money shall be in the personal representative, not only for the protection of the defendant, but also in order that there may be a responsible party to take charge of the interests of those to be benefited. The law assumes that the court will appoint a trustee who is suitable for the purpose. If experience shows that incompetent persons are often selected, and that they are liable to be imposed upon in the way of being drawn into unwarranted compromises, it is a subject which properly commands the attention of the legislature. As the statute stands, its meaning is clear, and there is no call for a consideration of the common law upon the question." In addition to the above authorities, we cite Tiffany, *Death by Wrongful Act*, §125; 11 Am. & Eng. Ency. Law (2d ed.), 926-930.

A painstaking search justifies us in stating that there is no authority that denies to executors or administrators, acting as plaintiffs in suits to recover for wrongful death, the power to make compromises. Where the contract is not infected with fraud or other vice or infirmity, such remedy as the beneficiaries may have to objectionable settlements must be sought on the probate side of the court. In *Yelton v. Evansville, etc., R. Co.*, 134 Ind. 414, 21 L. R. A. 158, where the question involved was as to the power of the beneficiary to compromise a claim for the death of her husband, there was a *dictum* to the effect that an executor or administrator could not settle. The language mentioned is now disapproved.

In proceeding to a consideration of the evidence, it is important to note, as before stated, that the issues based on the second paragraph of answer were limited to replies of general denial and no consideration. On this branch of the case counsel for appellee contend that there was no proof that "Flora J. Gipe, Admx.," whose name was attached to the instrument of release, was Flora J. Gipe, administratrix of the estate of Sylvester H. Gipe, deceased. The argument is made that Flora J. Gipe may have been the administratrix of a number of other estates. While the administratrix was in nowise bound by the agreement made by her decedent in his application before referred to, yet when we find that the instrument of release refers back to the application of the deceased, and that it was provided in said application that the legal representatives of the applicant would execute any such further instrument as might be necessary to evidence the release of the claim for damages on account of the death of the applicant, it can only be inferred that the signature, "Flora J. Gipe, Admx.," standing as it does in contradiction to the signature, "Flora J. Gipe," was intended to evidence the assent of appellant to the provisions of said agreement.

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With reference to the claim that there was no consideration moving to the administratrix, appellee's counsel contend: (1) That the contract of decedent entitled his wife upon his death to receive \$750 as benefits, and that therefore the relief department only paid what it was legally bound to pay to Flora J. Gipe in her personal capacity; (2) that the evidence does not show that the administratrix used or accounted for any part of the money paid. With reference to said first contention of appellee's counsel, the argument is faulty in that it is built upon the assumption that the widow had an absolute right to the relief fund. The widow did not have the right to the provision of the relief fund while the administratrix of the estate prosecuted or was entitled to assert a cause of action for the death of decedent. As pointed out in *Pittsburgh, etc., R. Co. v. Moore*, 152 Ind. 345, 44 L. R. A. 638, and *Pittsburgh, etc., R. Co. v. Hosea*, 152 Ind. 412, it was a case where both claims could not be enforced. If, therefore, the benefit of the contract was to be obtained, it was necessary that the right to assert a cause of action under the statute should be released. It will be observed that there has been no attempt to rescind the contract. The release is joint in form, but, in view of the fact that the execution of the release of damages for the death was a condition precedent to any benefit from the relief fund, we think, unless as beneficiary, Mrs. Gipe had some valid collateral agreement, as between her and her children, as to the extent of her right to participate in the proceeds, that the signing of the release as administratrix would operate to charge her in that capacity with the whole of the proceeds. As beneficiary, she would not be allowed arbitrarily to determine what portion, if any, of the proceeds of the trust she would pay over to that account, and, since it could be definitely determined, under a given state of facts, what was the extent of her liability as administra-

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trix, the mere receipt of the money in both capacities did not, *per se*, involve a waste of the trust. We do not think, therefore, that as the case is presented the appellant can be said to have been a party to a *devastavit*.

Recurring to the second ground of objection that appellee's counsel urge, it may be said that it is not necessary that the administratrix should have actually used or accounted for any part of the money paid, because she must account for her doings on the probate side of the court that appointed her as administratrix. It is not necessary to decide whether the release was contractual in its character, within the case of *Stewart v. Chicago, etc., R. Co.*, 141 Ind. 55. If the release was a mere receipt, it would be at least evidence, and, in the absence of conflicting evidence, should have been given its just effect.

This is a case where the representative in the action has, upon a consideration, released the claims of all beneficiaries, and, in the absence of a further assault than was made under the issues and evidence in this case, we hold that her action concluded all rights that were subsidiary to that of the plaintiff. It follows that the court below erred in refusing to instruct the jury to find for appellant, and in submitting to the jury the question as to whether the second paragraph of reply to the second paragraph of answer was made out upon the evidence. Other questions are discussed by counsel, but it appears unnecessary to decide them.

Judgment reversed, with a direction to the trial court to sustain appellant's motion for a new trial.

SHAFFER v. STERN ET AL.

[No. 20,043. Filed April 7, 1903.]

INTOXICATING LIQUORS.—Remonstrance.—Time of Filing.—A remonstrance, under §7283i Burns 1901, against the granting of a license to sell intoxicating liquors, filed on Friday immediately preceding the Monday on which the regular session of the board of commissioners begins, is in time. p. 376.

SAME.—Remonstrance.—Towns.—Majority of Voters in Township.—Wards.—A remonstrance against the granting of a license to sell intoxicating liquors in a town, signed by a majority of the legal voters of the township is sufficient, although it does not contain the signatures of a majority of the voters of the ward in which the applicant desires to sell. p. 376.

SAME.—Remonstrance.—Power of Attorney.—A remonstrance against the granting of a license to sell intoxicating liquors signed by power of attorney is valid. p. 377.

SAME.—Remonstrance.—Power of Attorney.—Death of Remonstrant.—Effect.—A power of attorney executed by a majority of the voters of a township authorizing the attorney to sign a remonstrance against the granting of a license to sell intoxicating liquors is not joint, but several as to each person who executed it, and the death of one or more persons executing it revoked the same as to them only. p. 377.

SAME.—Remonstrance.—Trial.—Evidence.—Where an application for the sale of intoxicating liquors was denied on account of a remonstrance thereto, as authorized by §7283i Burns 1901, the refusal of the court to permit the applicant to make proof of qualifications was harmless. p. 377.

From Harrison Circuit Court; *E. A. Ely*, Special Judge.

Proceeding by Charles F. Shaffer to obtain a license to sell intoxicating liquors in which Herman J. Stern and others filed a remonstrance. From a judgment sustaining the remonstrance, applicant appeals. Transferred from Appellate Court, under §1387u Burns 1901. *Affirmed.*

E. B. Stotsenburg, J. H. Weathers and M. W. Funk, for appellant.

G. W. Self, William Ridley and R. S. Kirkham, for appellees.

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MONKS, J.—This proceeding was brought by appellant, under §7278 Burns 1901, §5314 R. S. 1881 and Horner 1901, to obtain a license to sell intoxicating liquors in the town of Corydon, Harrison township, Harrison county, Indiana, in a less quantity than five gallons at a time. §7283 Burns 1901, §5318 Horner 1901, Acts 1897, p. 253. The board of commissioners and the court below on appeal refused the license, and dismissed the application, on the ground that a majority of the legal voters of said Harrison township had remonstrated against granting said license to appellant, under §7283i Burns 1901, §5323i Horner 1901, being §9 of the act known as the Nicholson law (Acts 1895, p. 248).

The remonstrance in this cause was filed on Friday, August 30, 1901, and the board of commissioners met in regular session on Monday, September 2, 1901. It is claimed by appellant that said remonstrance, under §9 of the Nicholson law, was not available, because not filed on or before Thursday, August 29, 1901. This court has held that a remonstrance under said §9 may be filed on or before the Friday immediately preceding the Monday on which the regular session of the board of commissioners begins. *White v. Prifogle*, 146 Ind. 64, 65; *Flynn v. Taylor*, 145 Ind. 533, 534-536.

It is next insisted that the remonstrance was insufficient because it is not shown that it was signed by a majority of the legal voters of the ward in the town of Corydon, in which appellant desired to sell intoxicating liquors. The remonstrance was signed by a majority of the legal voters of Harrison township, and this, under said §9, *supra*, deprived the board of commissioners, and the court below on appeal, of jurisdiction to grant a license to appellant. If the application is to sell intoxicating liquors in an incorporated or unincorporated town, a remonstrance by a majority of the legal voters of the township in which the applicant desires to sell is all that is required to deprive the

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board of commissioners of jurisdiction to grant the same. It is only where the applicant desires to sell intoxicating liquors in the ward of a city that a remonstrance by a majority of the legal voters of said ward is required. *Massey v. Dunlap*, 146 Ind. 350, 352-355.

The remonstrance in this case was not signed by the voters in person, but by one acting under the authority of a written instrument executed by said voters. Appellant insists that the remonstrance was void because not executed by the voters in person. In *Ludwig v. Corey*, 158 Ind. 582, the power of attorney was substantially the same as the one in this case, and this court held the remonstrance valid, the same as if signed by the voters themselves. The last-named case was followed and approved in *Boomershine v. Uline*, 159 Ind. 500.

Wilbur F. Denbo and Edward E. Rhodes, two voters of said township, who had executed said power of attorney, died before the remonstrance in this case was signed. Appellant claims that the power of attorney was joint, and that the death of said persons revoked the same as to all who joined in its execution. The power of attorney was not joint, but several, as to each person who executed it. The death of any one or more of those executing the power of attorney revoked the same as to them only.

Appellant complains because he was not allowed to prove on the trial that he possessed the qualifications required by §7278, *supra*. As appellant was denied a license, and his application was dismissed on account of the remonstrance under §9, *supra*, the refusal of the court to permit him to make proof of his qualifications under said section, even if erroneous, was harmless. *Ludwig v. Cory*, *supra*.

Judgment affirmed.

MCKEE v. CITY OF GREENSBURG.

[No. 20,048. Filed April 7, 1903.]

MUNICIPAL CORPORATIONS.—*Street Improvements.—Acceptance of Bid.—Breach of Contract.—Complaint.*—No error was committed in sustaining a demurrer to a complaint against a city for an alleged breach of contract in refusing to permit plaintiff to improve a street after accepting his bid, where it was not disclosed by the complaint whether jurisdiction had attached to make the improvement.

From Decatur Circuit Court; *F. T. Hord*, Judge.

Action by George McKee against the city of Greensburg. From a judgment for defendant on demurrer to complaint, plaintiff appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

J. K. Ewing and *C. H. Ewing*, for appellant.

H. C. Skillman, for appellee.

GILLET, J.—Appellant instituted this action against appellee to recover damages against it for alleged breach of contract. He charges that appellee's common council refused to permit him to improve a street after accepting his bid, made pursuant to an advertisement for bids for the performance of such work. A demurrer was sustained to the amended complaint, and a judgment followed that appellant take nothing.

The history of the proceedings before the common council, as set out in the amended complaint, discloses that the proceedings were had under §4288 *et seq.* Burns 1894, commonly known as the Barrett law. As it appears from the amended complaint that the common council entered a resolution purporting to rescind its action in accepting appellant's bid, the presumption must be in favor of such official action. *State v. Wenzel*, 77 Ind. 428; *Adams v. Davis*, 109 Ind. 10; *Sanders v. Hartge*, 17 Ind. App. 243. It is therefore clear that the burden was on appellant to

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show that jurisdiction had attached to make the improvement. *Barber Asphalt Pav. Co. v. Edgerton*, 125 Ind. 455. We are unable to determine from the vague allegations of the complaint as to the character of the proposed improvement whether the improvement was of such a nature that the common council had authority to order it made under said law. See *Adams v. City of Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 77 Am. St. 484; *Taylor v. Patton*, ante, 4. Appellant was charged with notice that the power of the common council to contract was limited, and, if it had embarked on an *ultra vires* undertaking, its action in refusing to permit appellant to proceed was proper.

Other objections are urged to the complaint, but it is not necessary to consider them.

Judgment affirmed.

REPUBLIC IRON & STEEL COMPANY v. THE
STATE.

[No. 19,785. Filed April 8, 1903.]

CONSTITUTIONAL LAW.—*Weekly Wage Law*.—*Title*.—*Penalty*.—The penalty clause of the act of 1899 (Acts 1899, p. 193) providing for the weekly payment of wages is not void because no mention thereof is made in the title of the act. pp. 382, 383.

SAME.—*Weekly Wage Law*.—The act of 1899 (Acts 1899, p. 193) providing for the weekly payment of wages and imposing a penalty for the violation thereof is an unreasonable restriction upon the freedom of contract, and is unconstitutional and void. pp. 383-392.

From Delaware Circuit Court; *J. G. Leffler*, Judge.

Action by the State against the Republic Iron & Steel Company. From a judgment for plaintiff, defendant appeals. *Reversed*.

S. N. Chambers, S. O. Pickens, C. W. Moores, J. W. Ryan, W. A. Thompson, F. C. Olive and R. F. Davidson, for appellant.

W. L. Taylor, Attorney-General, *Merrill Moores, C. C. Hadley and E. D. Salsbury*, for State.

180	379
d186	565
d186	568
f167	222

HADLEY, C. J.—Action in the name of the State to recover wages and a penalty under the provisions of §§1, 2 of the act approved February 28, 1899 (Acts 1899, p. 193) commonly known as the weekly wage law.

It is averred in the complaint that the defendant, the Republic Iron & Steel Company, is a corporation engaged in operating a manufacturing plant at Muncie, Indiana, and employs therein a large number of persons to labor for hire; that the defendant is not a common carrier engaged in interstate commerce; that on the 1st day of February, 1900, and prior thereto, William Haverstick was engaged by the defendant to work in said plant; that on the 10th day of February, 1900, the defendant paid Haverstick for his services rendered up to and including the 31st day of January, 1900, but reserved and held back the wages due him for services rendered during the first ten days of February, 1900; that on the 17th day of February, 1900, the defendant was indebted to Haverstick for labor performed, in the sum of \$96.95, which service is set forth in a bill of particulars filed as a part of the complaint; that subsequent to the 1st day of February, 1900, Haverstick was never absent from his regular place of labor in said plant at any time of stated payment of wages fixed by the defendant; that Haverstick was present at his regular place of labor on the 17th day of February, ready and willing to receive the wages due to him, and there was due him on said day said amount of \$96.95, and which remains unpaid; that although the laws of the State of Indiana require the defendant to pay its employes each week all that is due, save only the right to withhold from an employe compensation for services for six days, said defendant wrongfully and unlawfully failed, neglected, and refused to comply with said laws, and to pay Haverstick each week what was due him. Prayer for judgment for Haverstick for amount due, with six *per centum* thereon, and for the State a judgment equal to fifty *per centum* of the unpaid wages. Ap-

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pellant's demurrer to the complaint was overruled, and a proper exception reserved. Upon issues joined, there was a trial by the court, and a finding and judgment for the plaintiff for \$48.45 for the use of the common schools, assessed against the defendant as a penalty on the amount due and unpaid Haverstick when the suit was commenced, and for all costs.

Appellant's assault upon the complaint questions the constitutional validity of the statute upon which the action is founded. It is conceded that the evidence supports the essential averments of the complaint, and is sufficient to entitle appellee to a recovery, if the statute in question is valid. The preamble and three material sections of the act follow: "An act providing for the weekly payment of wages due employes, making it unlawful for an employer to assess a fine against the wages of an employe, and regulating changes in rate of wages, prohibiting the assignment of future wages; providing for its enforcement and repealing all laws in conflict therewith. [Approved February 28, 1899.] Section 1. Be it enacted by the General Assembly of the State of Indiana, that every person, company, corporation or association employing any person to labor, or in any other service for hire, shall make weekly payments for the full amount due for such labor or service, in lawful money of the United States to within six days or less of the time of such payment; but if, at any time of stated payment, any employe as aforesaid shall be absent from his regular place of labor or service, he shall be paid in like manner thereafter on demand: Provided, that this act shall not apply to any employe engaged by a common carrier in interstate commerce: And provided, that the labor commissioners of the State, after notice and hearing, may exempt any of the aforesaid parties whose employes prefer a less frequent payment, from paying any of its employes weekly, if, in the opinion of the said commissioners, the interests of the public and of such employes

will not suffer thereby. Section 2. The chief inspector of the department of inspection of this State, or any person interested, may bring suit in the name of the State in any court of competent jurisdiction, and the prosecuting attorney of any county wherein such suit is brought, shall prosecute the same against any person, company, corporation or association that neglects or refuses to comply with §1 of this act, within ten days after such payment is due and left unpaid; and in case judgment is rendered in favor of said employe and against said defendant for the sum alleged to be due or any part thereof, six *per centum* of such sum shall be added to such judgment from the time when payment was due; and a penalty of fifty *per centum* of the amount of such judgment shall be assessed and collected from said defendant by said court and paid into the school fund of the State." "Section 6. It is hereby made the duty of the chief inspector and of the department of inspection to enforce the provisions of this act by the processes of the courts, and in the name of the State; and, upon their failure so to do, any citizen of the State is hereby authorized to do the same in the name of the State." Acts 1899, p. 193.

The amount of wages due Haverstick at the commencement of this suit, to wit, \$96.95, having been subsequently, and before trial, fully paid, the judgment rendered was limited to an imposition of the fifty *per centum* penalty provided for by §2 of the act. Hence, from the state of the record no other question is properly presented by the appeal than the validity of said sections.

1. It is first submitted that, because the title of the act makes no mention of penalties for the violation of its provisions, the penalty clause of §2, *supra*, is void under article 4, §19, of the Indiana Constitution, which provides that "Every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title." The evident purpose in requiring a title to

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a legislative proposition was thereby to convey notice of the general subject to be affected to those who are called on to act upon it, and thus to prevent deception by the blending of incongruous subjects in the same act. It is only necessary that the general subject of the act be expressed—that is, be indicated—by the title. It is not essential that the means and methods provided in the act for the securing of intended results and ends shall be set forth in the title. The Constitution is satisfied if the constituent means embraced in the body of the act have a proper relation to each other and to the subject expressed in the title, and are consistent in tending to carry forward and to accomplish the general purpose indicated by the title and intended by the legislation. *Isenhour v. State*, 157 Ind. 517, 87 Am. St. 228; *Lewis v. State*, 148 Ind. 346; *Benson v. Christian*, 129 Ind. 535; *City of Indianapolis v. Huegele*, 115 Ind. 581.

No act of the legislature can be made effective without some reasonable provision for its enforcement, and the assessment of a penalty for noncompliance has long and many times been recognized by the General Assembly and the courts of this State as an efficient and reasonable means of securing obedience. The subject of the act in question is “to provide for the weekly payment of wages due,” and to secure performance of the duty thus imposed upon employers, a penalty is provided for nonperformance. The penalty provision of §2, *supra*, is, therefore, not only connected with and germane to the subject of the act, but calculated to be an effective means in accomplishing the purpose indicated by the title. Hence the provision is not within the evil intended by the Constitution to be excluded.

2. It is not necessary to a disposition of the case that we determine whether appellant, being arraigned on a state statute, can demand protection of its liberty and property under the fifth amendment of the federal Constitution (see *Thorington v. Montgomery*, 147 U. S. 490, 13 Sup. Ct.

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394, 37 L. Ed. 252; *Holden v. Hardy*, 169 U. S. 366-382, 18 Sup. Ct. 383, 42 L. Ed. 780; *State v. Boswell*, 104 Ind. 541; *Butler v. State*, 97 Ind. 378, 382), or whether, being a corporation, the right to sue and be sued, so invests it with citizenship as to entitle it to invoke the fourteenth amendment to the federal Constitution against an abridgement of its privileges and immunities. See *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552; *Daggs v. Orient Ins. Co.*, 136 Mo. 382, 396, 38 S. W. 85, 58 Am. St. 638, 35 L. R. A. 227.

It is not denied that appellant, though a corporation, is a person, within the rulings of the Supreme Court of the United States, and as such may demand that its liberty and property be safeguarded under the last two clauses of §1 of the fourteenth amendment to the federal Constitution, which declares, "Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It is furthermore conceded that appellant may invoke, as it does, the guaranties of the federal and state Constitutions against the impairment of contracts (Art. 1, §10, U. S. Const.; Art. 1, §24, State Const.); and putting aside all subsidiary questions not properly involved in the appeal, we come directly to a consideration of the judgment rendered, which stands wholly upon the statute, and which must fall if the supporting provisions of the statute are found to be unconstitutional.

Appellant is authorized to contract and be contracted with as a natural person, and we must therefore assume at the beginning that in its legislation the State is bound to recognize, even in the exercise of its police power, the right of all persons to the equal protection of the laws, and to the security afforded by due process of law. The right to a sustenance, and to acquire property, and to make treaties in relation thereto, is liberty in the constitutional sense.

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Labor is property. It is exchangeable for food and raiment and comforts, and may be bought and sold, and contracts made in relation thereto, the same as concerning any other property.

The question therefore arises, is the arbitrary denial of the right to exchange money for labor—one class of property for another—in matters which affect no public interest, an unwarrantable interference with the right of contract, and a depriving of the person of liberty and property without due process of law? The only rational grounds upon which it is claimed there may be legislative interference with freedom of contract for lawful purposes is in the exercise of that undefined, reserved force of the people known as the police power. There is a divergence of view as to the proper scope and application of this power, but all authorities seem to agree that it may be exerted only on behalf of some general, public interest, as distinguished from individuals or classes; that is to say, to protect the public health, safety, morals, prevent fraud and oppression, and promote the general welfare. It is not to be invoked to protect one class of citizens against another class unless such interference is for the real protection of society in general. As far-reaching and flexible as the power has often been held to be, it is nowhere claimed for it that it may override the Constitution, and strike down a right that has been solemnly and expressly guaranteed by the fundamental law. The legislature has exclusive authority to make laws setting it in motion and regulating its exercise. This body, therefore, very properly has a wide discretion in determining what interest of the public requires it, and what measures are necessary for the protection of such interest. But when the power is used for the purpose of regulating a business, occupation, or employment which in itself is lawful and useful to the community, it becomes the duty of the court, when called on, to decide whether the particular

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regulation is just and reasonable and in harmony with the constitutional guaranties, or whether it is an unwarrantable invasion of the protected rights of the citizen to pursue such business or employment upon terms of his own choosing. *Street v. Varney Electrical Sup. Co.*, ante, 338; *State v. Gerhardt*, 145 Ind. 439-451, 33 L. R. A. 313; *People, ex rel., v. Coler*, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. 605; *Colon v. Lisk*, 153 N. Y. 188, 196, 47 N. E. 302, 60 Am. St. 609; *Ruhstrat v. People*, 185 Ill. 133, 57 N. E. 41, 49 L. R. A. 181, 76 Am. St. 30; *State, ex rel., v. Ashbrook*, 154 Mo. 375, 55 S. W. 627, 48 L. R. A. 265, 77 Am. St. 765; *Mugler v. Kansas*, 123 U. S. 623, 661, 8 Sup. Ct. 273, 31 L. Ed. 205; *Lawton v. Steele*, 152 U. S. 133, 137, 14 Sup. Ct. 499, 38 L. Ed. 385; *Ex parte Whitwell*, 98 Cal. 73, 32 Pac. 870, 35 Am. St. 152, 162, 19 L. R. A. 727; *Askam v. King County*, 9 Wash. 1, 36 Pac. 1097; *Eden v. People*, 161 Ill. 296, 43 N. E. 1108, 32 L. R. A. 664, 52 Am. St. 365; *Tiedeman, State & Fed. Control*, §1; *Tiedeman, Limitation of Police Power*, §85; *Conley v. Union, etc., Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679.

We quote the words of Brown, J., in *Lawton v. Steele, supra*: "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts." It follows that a statute to be within the power must be responsive to some public necessity, suit-

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able to subserve it, and reasonable in its operation upon the persons whom it affects. It is not claimed that the weekly payment of wages involves any question of public health, public safety, or public morals.

The Attorney-General endeavors to justify the law upon two grounds: (1) The wage-earners are not upon an equal footing with employers, and opportunities for oppression and consequent public suffering ensue; and (2) thrift being beneficial to the community, it should be encouraged by enabling workmen to pay cash for current demands, which can only be done by requiring frequent payment of wages. Assuming all these things to be true, they do not of themselves justify the arbitrary invasion of the personal rights and liberty of the citizen. Liberty to contract on one's own terms, to decide for himself his own employment, to buy and sell, to exchange one belonging for another, are among the most valuable and cherished rights. As was said in *State, ex rel., v. Ashbrook*, 154 Mo. 375, 55 S. W. 627, 48 L. R. A. 265, 77 Am. St. 765: "In order to sustain legislation of the character of the act in question, as a police measure, the courts must be able to see that its object to some degree tends toward the prevention of some offense or manifest evil, or has for its aim the preservation of the public health, morals, safety or welfare. * * * Mere legislative assumption of the right to direct and indicate the channel and course into which the private energies of the citizens shall flow, or the attempt to abridge, or hamper, his right to pursue any lawful calling, or avocation, which he may choose, without unreasonable regulation or molestation, have ever been condemned in all free government."

"If there is one thing which more than another," says Justice Shiras in *Baltimore, etc., R. Co. v. Voigt*, 176 U. S. 498, 505, 20 Sup. Ct. 385, 44 L. Ed. 560, "public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and volun-

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tarily, shall be held sacred, and shall be enforced by courts of justice."

Is the statute in question a reasonable regulation and reasonable in its operation upon the persons whom it affects? The contract prohibited affects employer and employe alike. If the master can employ only upon terms of weekly payment, the workman can find employment on no other terms.

7// It will be observed that the statute gives the parties no choice
7//—no right to waive the provisions of the law. The language is, every person, company, or corporation, employing any person to labor shall make weekly payments for the full amount due for such labor, and the chief inspector, or any person interested, may bring suit in the name of the State against any person, company, or corporation that neglects or refuses to comply within ten days after such payment is due and left unpaid.

v. The obvious intention of the legislature was to make contracts for persons that they would not in all cases make for themselves, and to forbid the making of contracts that they would make. The laborer may be the chief sufferer. His labor may be the only means of supplying himself and family, but by this law he is denied the right to work, and another the right to employ him, unless he can be paid once a week. Any law or policy that disables the citizen from making a contract whereby he may find lawful, needed, and satisfactory employment is unreasonable.

It may be that the workman will desire and request his employer, as conducive to economy and saving, to keep back all wages not needed for current necessities. Whether he leaves his surplus earnings with his employer, or deposits them with the building and loan association, or with the savings bank, involves no public interest and affects no public concern. Yet, according to this statute, if, in a fair and open agreement the employer "neglects or refuses" to pay the full amount earned for a period of ten days after due, the chief inspector may, if he disapproves the arrange-

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ment (and upon his failure to act any citizen of the State may sue), without the consent and even over the protest of the workman, in the name of the State, not only compel payment, but mulct the employer in a fifty *per centum* penalty for making an honest effort to favor his employe. The statute places the wage-earners of the State under *quasi* guardianship. It classes them with minors and other persons under legal disability, by making their contracts void at the pleasure of a public officer. It tends to degrade them as citizens, by impeaching their ability to take care of themselves. It is paternalism, pure and simple, and in violent conflict with the liberty and equality theory of our institutions. It is no argument to say that our assumption is unreasonable, and that the inspector is not likely to interfere in such cases. Whether he will or not is unimportant. In discussing the constitutionality of the act in question, it is to be determined not by what has been done or is likely to be done under it, but what may be done under and by virtue of its authority.

We do not assert that the legislature is powerless to regulate the payment of wages when the same are paid at unreasonable periods, or that a community composed largely of workingmen may be injuriously affected by unduly delayed payments, for these questions are not before us; but what we do hold is that this statute which takes away from both the employer and the employe, whether in the shop, in the store, or on the farm, all power to contract for labor, except upon terms of weekly payment of wages in cash, is an unreasonable, and therefore an unconstitutional restriction.

It is also contended, that appellant, being an employer and not an employe, can only raise such questions as involve the rights of employers, and that the constitutional right of a laborer to contract to do lawful work upon terms satisfactory to him can not be questioned or appropriated by an employer as a defense, thus applying to contracting

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parties the rule affirmed in *Pittsburgh, etc., R. Co. v. Montgomery*, 152 Ind. 1, 13, 71 Am. St. 301, and many other cases. We are unwilling to admit that this is a proper case for the application of the rule, since we are unable to see how the result may be different, whether the laborer is disqualified from entering into a contract of employment, or the employer disqualified from making it. In either view the contract which the parties desire to make is prevented, and both parties mutually and equally affected by the interdiction.

We would not be understood as holding that the freedom of contract is wholly beyond legislative control. There are many instances in which restraint may be properly imposed, but in each and every one the relation to some public benefit must be clearly discernible. Certain contracts are required to be in writing, manifestly to promote public morals by removing the temptation to perpetrate frauds by perjury. A householder is disqualified from withdrawing in advance from those dependent upon him, the benefits of the exemption laws, and thus prevented from imposing upon the public the burden of their sustenance. Statutes limiting the rate of interest are valid, as preventing unconscionable extortion; and so on through a long list that might be given, each showing a logical and an appropriate relation to the promotion or protection of some interest of society.

1. The cases of *Opinion of the Justices*, 163 Mass. 589, 40 N. E. 713, 28 L. R. A. 344, *State v. Brown, etc., Mfg. Co.*, 18 R. I. 16, 25 Atl. 246, 17 L. R. A. 856, and *Skinner v. Garnett, etc., Co.*, 96 Fed. 735, cited by the Attorney-General as sustaining his contention, can not be accepted as controlling precedents. The Massachusetts case is not an adjudication at all, but the uncontested answer of the justices of the supreme court to a question propounded to them by the house of representatives, which we quote: "Is it within the constitutional power of the legislature to extend

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the application of the present law, relative to the weekly payment of wages by corporations, to private individuals and partnerships?" The premise upon which the answer of the justices is constructed, is indicated in the opening lines as follows: "Your question implies that in your opinion the present law relating to the weekly payment of wages by certain corporations to their employes, is constitutional, and your inquiry is whether it is within the constitutional power of the legislature, to extend the law to private individuals and to partnerships?" The question before the justices was not the constitutionality of the law as it existed, but assuming that the statute was valid as it applied to corporations, was it constitutional to extend its provisions to individuals and partnerships? Moreover, it is expressly noted by the justices that the power granted the legislature by the constitution of that state is more comprehensive than that found in the constitutions of some of the other states, and the provision pointed out and relied upon as supporting the view expressed is radically different and broader than the provisions of the Indiana Constitution. The Rhode Island case is even less a precedent, because it rests upon the theory that the statute was but an amendment to the charter of a corporation under the reserved power of the legislature to amend. The Skinner case is of little value, (1) because it involves the payment of wages monthly; and (2) because the decision of Judge Morrow turns on substantially the same grounds as the Rhode Island case.

Similar statutes are held to be unconstitutional in the following cases: *Braceville Coal Co. v. People* (weekly payment), 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340, 37 Am. St. 206; *Commonwealth v. Isenberg* (biweekly payment), 4 Pa. Dist. Rep. 579; *San Antonio, etc., Co. v. Wilson* (biweekly payment), 4 Tex. App. Civ. Cas. 565, 19 S. W. 910. The following cases are also instructive upon the general subject: *State v. Fire Creek, etc., Co.*, 33 W. Va.

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188, 10 S. E. 288, 6 L. R. A. 359, 25 Am. St. 891; *God-charles v. Wigeman*, 113 Pa. St. 431, 6 Atl. 354; *State v. Loomis*, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789.

The foregoing conclusions lead us to conclude that the act in controversy, so far as it relates to the question herein involved, is a violation of §1, article 1, of the state Constitution, commonly known as the bill of rights, and of the fourteenth amendment to the federal Constitution, denying a state the power to deprive a person of life, liberty, or property without due process of law, and the demurrer to the complaint should have been sustained.

Judgment reversed, and cause remanded, with instructions to sustain appellant's demurrer to the complaint.

THE GERMANIA FIRE INSURANCE COMPANY v. PITCHER.

[No. 19,863. Filed October 14, 1902. Rehearing denied April 8, 1903.]

INSURANCE.—Proof of Loss.—Waiver.—An adjuster who has been sent by an insurance company for the express purpose of adjusting a loss, has authority to waive a provision of the policy concerning proofs of loss. *p. 395.*

SAME.—Proof of Loss.—Waiver.—Pleading.—Verdict.—A complaint in an action on an insurance policy disclosed that proofs of loss were not made within sixty days as required by the policy, but alleged that when the fire occurred plaintiff gave notice thereof to defendant's agents who had issued the policy and defendant sent its adjuster to adjust the loss; that he entered into negotiations with plaintiff's agent concerning the loss, and continued the negotiations until after the time within which by the terms of the policy the assured was required to furnish formal proofs of loss; that they were unable to agree as to the amount of the loss and defendant refused and still refuses to pay the same, but did not base its refusal on the failure of plaintiff to furnish proofs of loss. *Held*, that if the complaint does allege facts from which a waiver can be declared as a matter of law, the plaintiff was entitled thereunder to take the verdict of the jury upon the mixed question of law and fact as to whether there was a waiver of proofs of loss. *pp. 394, 395.*

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INSURANCE.—Proof of Loss.—Waiver.—The refusal of an insurance company to pay a loss because the claim is excessive may be a waiver of the furnishing of proofs of loss as much as where the refusal is put on any other grounds. *pp. 400-403.*

SAME.—Proof of Loss.—Waiver.—Evidence.—An insurance company acting on an oral notice sent its adjuster to adjust a loss. He entered into negotiations of settlement with the agent of insured and there was but little difference between them over the items discussed. A few days later the company sent proofs of loss to its local agent but the agent of insured refused to execute the papers because he had not had a wall examined which was injured by the fire and which the board of works had ordered torn down. The adjuster thereafter returned and went before the board of works with a son of insured and attempted to have the enforcement of the order delayed, and refused to pay for damage to the wall, but said nothing about the omission to furnish proofs of loss. *Held*, that the evidence was sufficient to show a waiver of proofs of loss. *pp. 403, 404.*

SAME.—Ownership of Property.—A judgment for plaintiff in an action on an insurance policy will not be reversed because of the failure of the court to instruct the jury that it was necessary for plaintiff to prove that she was the owner of the property at the time of the fire, where the evidence showed without dispute that plaintiff was the owner at such time. *p. 405.*

APPEAL AND ERROR.—Harmless Error.—Instructions.—Insurance.—Under §870 Burns 1901, that a judgment shall not be reversed, "where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below," the Supreme Court will not reverse a judgment against an insurance company because of an instruction without the issues on the question of waiver of proofs of loss, where under the evidence no other conclusion could have been reached on the question of waiver than that reached by the jury. *pp. 405, 406.*

From the Superior Court of Vanderburgh County; *J. H. Foster*, Judge.

Action by Caroline C. Pitcher against the Germania Fire Insurance Company. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under §1387u Burns 1901. *Affirmed.*

S. N. Chambers, S. O. Pickens, C. W. Moores, A. Gilchrist and C. A. De Bruler, for appellant.

G. A. Cunningham, for appellee.

GILLET, J.—This action is based on a fire insurance policy executed by appellant to appellee. There was a judgment below in favor of appellee. Appellant assigns as error the overruling of its separate demurrer to the second and third paragraphs of complaint, and the overruling of its motion for a new trial.

The second and third paragraphs of complaint disclose the fact that proofs of loss were not made within sixty days after the fire, as required by the policy, but, in lieu thereof, the appellee seeks in said paragraphs to charge a waiver of such requirement. Appellant's counsel contend that said pleadings are in this respect insufficient. In the second paragraph of complaint it is alleged that when the fire occurred the appellee gave oral notice thereof to appellant's local agents who had issued said policy; that said agents gave notice to appellant; that the latter sent its adjuster to adjust the loss on appellee's said building; that said adjuster and an agent of appellee examined said building with a view to the adjustment of said loss; that said adjuster and the appellee's said agent entered into negotiations concerning said loss, and continued said negotiations from time to time until after the time within which, by the terms of said policy, the appellee was required to furnish formal proofs of loss; that appellee and appellant were unable to agree as to the amount of said loss; that the same has never been adjusted or settled; that the appellant refused and still refuses to pay the same, but that the appellant did not base its said refusal on the failure of appellee to furnish proofs of loss, but on other grounds altogether. By way of showing the theory of the pleader, there is added to the averments upon this subject the averment or statement, "that by its said conduct the defendant waived notice in writing from the plaintiff and the formal proofs of loss required by the terms of said policy." The third paragraph of complaint contains the same allegations in substance, except that it does not allege that the negotiations continued until after

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the time for furnishing formal proofs of loss expired, and it states explicitly that appellant made no objection to appellee's claim because of her failure to furnish proofs of loss.

An adjuster who had been sent for the express purpose of adjusting a loss has authority to waive a provision of the policy concerning proofs of loss. *Aetna Ins. Co. v. Shryer*, 85 Ind. 362; *Indiana Ins. Co. v. Capehart*, 108 Ind. 270; *McCollum v. Liverpool, etc., Ins. Co.*, 67 Mo. App. 66, and cases there cited.

It must be confessed that the second paragraph of complaint is wanting in the allegation of facts sufficient to constitute a technical estoppel, although the paragraph goes some length in that direction. We think, however, that it can be affirmed from the facts alleged that if there has not been a waiver that can be declared as a matter of law, the appellee was at least entitled to take the verdict of a jury upon the mixed question of law and fact as to whether there was a waiver.

In *Insurance Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689, where the fact was that an agreement has been made by an insurance company to extend the time of payment of a premium note, it was said by the Supreme Court of the United States: "Forfeitures are not favored in the law. They are often the means of great oppression and injustice. And, where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture, upon such compensation being made. It is true, we held in *Statham's Case*, 93 U. S. 24, that, in life insurance, time of payment is material, and can not be extended by the courts against the assent of the company. But where such assent is given, the courts should be liberal in construing the transaction in favor of avoiding a forfeiture. The case of leases is not without analogy to the present. It is familiar law, that, when a lease has become forfeited, any act of the landlord indicating a recognition of its continu-

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ance, such as distraining for rent, or accepting rent which accrued after the forfeiture, is deemed a waiver of the condition. * * * In *Ward v. Day*, 4 Best & Sm. 335, after a forfeiture of a license to gather minerals off of a manor had been incurred, the landlord entered into negotiations with the licensee and his son, to grant to the latter a renewal of the license when it should expire; and terms were agreed on, which the landlord afterwards refused to carry out. It was held that by entering into those negotiations, he waived the forfeiture of the original license. The negotiations assumed that the original license was to continue to its termination. The exaction of the forfeiture was in the landlord's election; and he evinced his election not to enforce it by entering into the negotiations. Justice Blackburn says: 'Most of the cases in which the doctrine of election has been discussed have been cases of landlord and tenant under a regular lease, in which has been reserved a right of reëntry for a forfeiture; that is, an option to determine the lease for a forfeiture; but this doctrine is not, as Mr. Russell seems to think, confined to such cases. So far from that being so, the doctrine is but a branch of the general law, that, where a man has an election or option to enter into an estate vested in another, or to deprive another of some existing right, before he acts he must elect, once for all, whether he will do the act or not. He is allowed time to make up his mind; but when once he has determined that he will not consider the estate or lease, whichever it may be, void, he has not any further option to change his mind.' And then the learned judge cites authorities, going back to the Year Books, to show that a determination of a man's election in such cases may be made by express words, or by act; and that if, by word or by act, he determines that the lease shall continue in existence, and communicates that determination to the other party, he has elected that the other shall go on as tenant. These cases show the readiness with which courts seize hold of any cir-

cumstances that indicate an election or intent to waive a forfeiture. We think that the present case is within the reason of these authorities; and that the objection, that the note was already past due when the agreement to extend it was made, is not sufficient to prevent said agreement from operating as a waiver of the forfeiture."

In the opinion of the court in *Queen Ins. Co. v. Young*, 86 Ala. 424, 5 South. 116, 11 Am. St. 51, we find the following language: "Conditions in a policy of insurance, limiting or avoiding liability, are strictly construed against the insurer, and liberally in favor of the assured. Though a waiver may be in the nature of an estoppel, and maintained on similar principles, they are not convertible terms. The courts, not favoring forfeitures, are usually inclined to take hold of any circumstances which indicate an election to waive a forfeiture. A waiver may be created by acts, conduct, or declarations, insufficient to create a technical estoppel. If the company, after knowledge of the breach, enters into negotiations or transactions with the assured, which recognize and treat the policy as still in force, or induce the assured to incur trouble or expense, it will be regarded as having waived the right to claim the forfeiture."

In *Kiernan v. Dutchess, etc., Co.*, 150 N. Y. 190, 44 N. E. 698, it was said by the New York court of appeals: "There may be a waiver by express agreement or through estoppel, but neither is required to effect that result, as words or acts from which an intention to waive may reasonably be inferred are sufficient, at least when acted upon. *Titus v. Glenns Falls Ins. Co.*, 81 N. Y. 410, 419; *Roby v. American Central Ins. Co.*, 120 N. Y. 510; *Armstrong v. Agricultural Ins. Co.*, 130 N. Y. 560. The distinction between waiver and estoppel, as applied to the law of insurance, is not in all respects clearly defined. An express waiver is in the nature of a new contract, modifying to some extent the old one,

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It does not require a new consideration unless it is by inducing a change of position, for the law of waiver seems to be a 'technical doctrine, introduced and applied by courts for the purpose of defeating forfeitures.' *People v. Manhattan Co.*, 9 Wend. 351, 381; *Insurance Co. v. Norton*, 96 U. S. 234. An estoppel forbids the assertion of the truth by one who has knowingly induced another to believe what is untrue and to act accordingly. While express waiver rests upon intention, and estoppel upon misleading conduct, implied waiver may rest upon either, for it exists when there is an intention to waive unexpressed, but clearly to be inferred from circumstances, or when there is no such intention in fact, but the conduct of the insurer has misled the insured into acting on a reasonable belief that the company has waived some provision of the policy."

Cases in this State, as well as elsewhere, justify the conclusion that there are some acts that the courts will treat as a waiver *per se*. In the carefully considered case of *Aetna Ins. Co. v. Shryer*, 85 Ind. 362, 368, where insufficient proofs had been furnished within the time, it was said: "The doctrine that an insurance company, by putting its refusal to pay the loss upon a definite ground different from a want of preliminary proofs, or of defect in their form or substance, waives the right to insist upon the failure to make such proof as a defense to an action on the policy, is in harmony with the elementary principle that a party, who places his refusal upon one ground, can not, after action brought, change it to another and different one. *Hanna v. Phelps*, 7 Ind. 21; *Turner v. Parry*, 27 Ind. 163; *Bartlett v. Adams*, 43 Ind. 447; *Blair v. Hamilton*, 48 Ind. 32; *Emlden v. Augusta*, 12 Mass. 307; *Gerish v. Norris*, 9 Cush. 167. There is no reason why this rule should not apply to policies of insurance as well as other contracts."

In a subsequent case it was said by this court: "Besides, since it appears by the complaint that an adjustment had

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been made by an agent duly empowered for that purpose, and that the company had afterwards notified the plaintiff that the loss would not be paid, it must be deemed that further notice and proof have been waived. After an insurance company has itself taken cognizance of a loss, and prepared such proofs as it deems essential to an adjustment, the insured may assume, until notified to the contrary, that additional notice and proofs are not required." *American Cont. Ins. Co. v. Sweetser*, 116 Ind. 370. In a still later case this court said: "The complaint alleged that the appellant had been notified by the appellee of the loss, and the appellant took possession of the policy and refused to adjust or pay the loss, and notified appellee that it would not adjust or pay the same; under this state of facts the appellee had the right to believe that proof of loss was unnecessary, and would be of no avail and it was a waiver upon the part of the appellant, and it is estopped from setting up such breach of the policy." *Norwich, etc., Ins. Co. v. Girton*, 124 Ind. 217.

In a number of cases the Appellate Court of this State has held that a denial of liability before the insured is in default in furnishing the proofs is a waiver. *Continental Ins. Co. v. Chew*, 11 Ind. App. 330, 54 Am. St. 506; *Aetna Ins. Co. v. Strout*, 16 Ind. App. 160; *National, etc., Ins. Co. v. Whitacre*, 15 Ind. App. 506; *Western Assur. Co. v. McCarty*, 18 Ind. App. 449; *Home Ins. Co. v. Boyd*, 19 Ind. App. 173; *Home Ins. Co. v. Sylvester*, 25 Ind. App. 207. As said in *National, etc., Ins. Co. v. Whitacre, supra*: "They proceeded to 'investigate' the loss, and denied their liability upon other grounds. There was, therefore, a waiver of the requirement for strict proof."

It would be difficult to formulate in advance rules by which it could in every instance be determined whether the conduct of the insurer amounts to a waiver *per se*, or is only evidence of a waiver that should be submitted to a jury to ascertain whether it will draw the inference of an

intent to waive. In cases that rest on an election made after the policy ceases to be operative, if the act of election is unequivocal, the only question to be determined by the jury is the existence of the facts by which it is manifested. In cases that rest not on the intent of the insurer but upon conduct during the time that proofs of loss may be made, we think that as applied to acts that by necessary implication give the assured to understand that proofs of loss need not be furnished, it may be affirmed, without more, that such acts are a waiver, *per se*, of the right to such proofs.

If, before the time for furnishing proofs of loss has expired, an insurance company denies liability upon the policy, the assured can only infer that it would be a useless act to submit proofs of loss, and therefore the company will not be permitted afterwards to object that such proofs were not furnished. If, during such time, the company puts its refusal to settle on other grounds, and not on the ground that proofs of loss have not been furnished, it ought not, as pointed out in *Aetna Ins. Co. v. Shryer, supra*, to be permitted to shift its ground in court to the extent of insisting upon a condition in its policy in the nature of a forfeiture that it is too late to comply with. We see no reason why such cases should not be put on the ground of election. The company, instead of awaiting proofs as a basis for investigation, voluntarily assumes a position that, if maintained, would render it useless to furnish proofs; and, as the condition is in the nature of a forfeiture, that the courts are disposed to relieve from if there is any basis for so doing, it seems but reasonable to prevent the company from taking an inconsistent position with reference to the clause thereafter. But, whatever is the philosophy of the rule, we think, in view of the authorities we have cited, that such conduct, during the time that the proofs might have been made, is a waiver *per se*. In the Shryer case, to which we have referred, it was said on page 367: "Another reason for holding that the appellant waived the preliminary proof

of loss is that payment was withheld upon other and different grounds. The objections were, as we have seen, not that proof had not been made, but that there were other grounds which vitiated the insurance. The writer from whom we have quoted says: 'Thus, where the insurers refuse to pay on special grounds, as that the contract was never completed, or that the insured had no interest, or on any other grounds having no reference to the sufficiency or insufficiency of the preliminary proof, it is a waiver of their right to object to any deficiency in this particular.' At another place this author says: 'So if the insurers decline to pay without giving any reason upon which to rest their refusal, such a refusal, by necessary implication, gives the assured to understand that the production of preliminary proof will be useless,—an idle ceremony, which the law will not require him to perform. So, if the refusal to pay is upon the ground that the property lost was not included in the risk, or that the assured has forfeited his right to recover by fraud.' May, Insurance, §§468, 469. Many cases are cited in support of the text, to which may be added, *Little v. Phoenix Ins. Co.*, 123 Mass. 380; *Graves v. Washington, etc., Ins. Co.*, 12 Allen 391; *Pennsylvania, etc., Ins. Co. v. Kittle*, 39 Mich. 51; *Farmers, etc., Ins. Co. v. Taylor*, 73 Pa. St. 342; *Farmers, etc., Ins. Co. v. Mecke*, 12 Reporter, 314; *Farmers, etc., Ins. Co. v. Moyer*, 97 Pa. St. 441."

Under the facts pleaded in the second paragraph of complaint relative to the negotiations continuing until after the time for furnishing proofs of loss had expired, it may be that it can not be affirmed that there was an election, because it is not alleged that the adjuster had knowledge that the proofs of loss had not been furnished, and it is also to be noted that it is not alleged that appellee's agent was an agent for the purpose of settling the loss, or that she affirmed his acts. We are inclined to think that, if the paragraph is sufficient, it must be because of the allegations

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that are subsequent to those pointed out. The great trouble about the pleading is that, after alleging the negotiations between the adjuster and the plaintiff's agent, the paragraph proceeds to allege, without laying any time, that the "plaintiff" and "defendant" were unable to agree as to the amount of the loss; that the loss has never been adjusted or settled; that the "defendant" refused to pay the same; that it did not base its refusal on the failure to furnish proofs of loss, but on other grounds altogether. We have concluded that the paragraph is sufficient. If, during the sixty days after the fire, there was a refusal to pay on other grounds, and not on the ground that proofs of loss had not been furnished, we think, as we have said, that there was a waiver *per se*; while, if such portion of said paragraph be construed as referring to a time after a forfeiture had been incurred, then we regard such refusal upon other grounds, coupled with silence as to the fact that proofs had not been furnished, when taken in connection with the protracted negotiations, as conduct tending to evince the election of the company not to enforce the forfeiture; thus making it proper, as the acts, so far as they can be said to be an evidence of mere intent, were equivocal in their character, to submit the question as a mixed one of law and fact, as to whether there was an intent to waive the particular ground of defense. As to what was the particular theory of the complaint we will discuss hereafter. We regard the third paragraph of complaint as more clearly sufficient than the second.

It is contended by appellant's counsel that these paragraphs should be held bad on the ground that the averment that the parties were unable to agree upon the amount of loss or damage controls the averments that defendant made no objection to plaintiff's claim on account of her failure to furnish proofs of loss, but based its refusal to pay the claim on other grounds. We do not think so. A refusal to pay because the claim of loss is excessive may be a

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waiver of the furnishing of proofs of loss, as much as where the refusal is put on any other ground. If the assured regards his damage as amounting to a certain sum, and will not take less, while the company refuses to give that sum, it but remains to submit the contention to the courts. The requirement of the contract that proofs of loss be furnished is to enable the company, without suit, to comply with its contract to indemnify the assured against damage, not exceeding the amount of the insurance; but if it gives notice that it will not make the adjustment the assured claims it should, then it is an idle act to furnish it with proofs of loss that it is known that it will not make use of for the purpose of adjustment.

We quote the following from the language of the court in *Aetna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125: "The evidence tends to show that the fire occurred on the 8th day of November, 1892; that the insured at once gave notice of this to the insurance company, and that within a few days thereafter the adjuster of the company came to the farm of the assured, examined and inquired into the loss, the cause of the fire, etc.; that the assured stated to the adjuster the particulars of the fire, submitted to him a written memorandum of the items of property destroyed, and their value. Some conversations and negotiations took place between the adjuster and the assured, which resulted in the adjuster finally offering the assured \$900 in full settlement of the loss. This offer was declined by the assured, whereupon the adjuster departed. We think the conduct of the adjuster justified the conclusion of the jury that the insurance company had refused to pay the loss."

The evidence clearly supports the verdict. The policy was upon a brick building known as No. 308 Upper Water street, in the city of Evansville. About the middle of September, 1899, while said policy was in force, an attached building, known as No. 310 Upper Water street, was destroyed by fire. Said fire caused a slight damage to the ceil-

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ings, wall-paper, and floors of said former building, and later, in December, 1899, the intervening wall of said buildings, that belonged, however, wholly to appellee, and stood entirely upon said insured premises, fell, carrying with it a part of the roof of her building. The company acted upon an oral notice of the fire, and about a week after its occurrence sent an adjuster to adjust the loss. He met with the appellee's rental agent, and they went upon the premises, and had some negotiation about the loss. This agent testified upon the trial that he had no authority to act for appellee except in the collection of rents. There appears to have been little of difference between the adjuster and the said rental agent over the items that were discussed, which did not include the wall. The matter was not closed up that day. A few days later the company sent proofs of loss to its local agent. Appellee's said agent refused to execute the papers because he had not had the wall examined. About this time the board of public works served notice on said agent that the wall was unsafe and must be torn down. The adjuster returned to the city about the middle of the next month, and he and the appellee's son, who was authorized to represent her, went before the board and attempted to have the enforcement of the order delayed. It is not disputed that the adjuster stoutly contended that the wall was safe, and advised appellee's son to let the city tear down the wall at its peril. The son testified that the adjuster then proposed "to let the matter rest for a while." There appears to have been no further conversation about the proofs of loss after the matter of the wall being unsafe came up. The adjuster testified that he told appellee's son, on the occasion of said adjuster's second visit, that the loss had been adjusted on the basis of \$16; that he was not willing to pay any more; that he considered the loss settled; and he admitted that he did not say anything about the omission to furnish proofs of loss.

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It is claimed that there was error in the giving of the first instruction, because it did not advise the jury that it was necessary for appellee to prove that she was the owner of the property at the time of the fire. There was no dispute upon this subject. It appears that the appellee had had the possession of the property from the time the policy issued until after the time of the fire; witnesses referred to it as her property, and a warranty deed to appellee, dated May 19, 1890, covering, as we may presume, the property in question, although we can not identify it as the property known as No. 308 Upper Water street, was put in evidence without objection. We refuse to reverse on this ground.

There is no more of merit in the objection that the court did not instruct the jury that under the first paragraph of the complaint the appellee must show that proofs of loss were made within sixty days after the fire. The instruction did not purport to relate to any particular paragraph. It undertook, in general terms, to state to the jury what appellee must prove in order to recover; and when the element of proofs of loss was reached the court instructed the jury that the appellee must prove that appellant had waived such provision of the policy. Subsequent instructions dealt fully with the subject of waiver.

Instruction number three is, in the abstract, a correct statement of the law of waiver, and it is in accord with the evidence, but it is objectionable because it instructed the jury as to the consequence if the jury should find, in connection with other matters of hypothesis, that the appellant admitted its liability during the course of the negotiations. We think that the court instructed without the issues in the particular mentioned. This would ordinarily lead to a reversal, but as an examination of the evidence, both of appellant and appellee, makes it plain that the jury could not have reached any other just conclusion upon the subject of waiver than the conclusion that it did reach, we deem it our

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duty to follow the mandate of the statute, which provides that the judgment shall not be reversed "where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below." §670 Burns 1901; *Stockwell v. Brant*, 97 Ind. 474; *State, ex rel., v. Ruhlman*, 111 Ind. 17; *Woods v. Board, etc.*, 128 Ind. 289; *Mode v. Beasley*, 143 Ind. 306; *Stanley v. Dunn*, 143 Ind. 495. The other instructions complained of relate to the subject of waiver. With the exception of the fifth, they contain correct instructions as to the law. The fifth is indefinite as to the time of the refusal to pay on other grounds. If it was after the time for furnishing proofs had expired, we think that it would only be evidence tending to show an election, and not a waiver *per se*, as the court charged; but, as the appellant's own evidence showed what amounted to a refusal to settle within the time that the proofs might have been furnished, the instruction, especially when taken in connection with the instructions generally, could not have misled the jury.

It is a matter of grave difficulty to determine the theory of the second and third paragraphs of complaint as to when the waiver occurred, although, as we have shown, a cause of action was stated in either event. But, having examined the appellee's evidence, as well as that of appellant, and finding that the evidence as to waiver was directed to the question as to a waiver by conduct during the sixty days, and that the appellant's own evidence made out a waiver within that time, we feel justified in holding that the theory upon which the case was tried was that there was a refusal to pay before the time for furnishing proofs of loss had expired, and to that theory the parties will therefore be held on appeal.

We find no prejudicial error. The judgment is affirmed.

ON PETITION FOR REHEARING.

PER CURIAM.—Appellant has filed a petition for a rehearing in this case. In the brief of counsel in support of the motion there seems to be no serious contention that the result was wrong, but exception is taken to the following sentence in the opinion: "If the assured regards his damage as amounting to a certain sum, and will not take less, while the company refuses to give that sum, it but remains to submit the contention to the courts." The opinion had to do with a case where it *prima facie* appeared that the company had thrown the assured off her guard until it was too late to comply with the condition. The court did not have before it a case of a mere division of opinion between the parties that resulted in a refusal of the company to pay the amount demanded, where there was afterwards, and within the sixty days, negotiation that put the affair so far upon its original footing that the courts would hold that the filing of proofs of loss afterward could be justly required, as an act that it could be said that the company, in view of the contract and its subsequent conduct, had a right to expect.

As to the element of the right to demand an arbitration of the damages, it is sufficient to say that no such demand was made by the appellant.

The petition for a rehearing is overruled.

BECKER v. BECKER.

[No. 20,045. Filed April 8, 1903.]

DIVORCE.—*Residence of Plaintiff.*—*Witnesses.*—*Qualification.*—A divorce decree will be reversed on appeal where there was no evidence that the witnesses as to the residence of plaintiff were resident freeholders and householders of the State as required by §1043 Burns 1901.

From Pulaski Circuit Court; G. W. Breeman, Judge.

Day v. Nottingham.

Suit for divorce by Elizabeth Becker against Charles Becker. From a decree for plaintiff, defendant appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Reversed.*

William Spangler and J. M. Spangler, for appellant.

MONKS, J.—Appellee sued for and obtained a decree of divorce and judgment for alimony.

It is insisted by appellant that proof of appellee's residence in the county and State was not made by two witnesses, who were "resident freeholders and householders of the State," as required by §1043 Burns 1901, §1031 R. S. 1881 and Horner 1901. We find, on examination of the evidence, that it was not shown that said witnesses possessed the qualifications required by said section. It follows that there was no evidence to sustain the allegations of the complaint in regard to appellee's residence, as required by said section of the statute, and that the trial court erred in overruling appellant's motion for a new trial.

The judgment is therefore reversed, with instructions to sustain appellant's motion for a new trial.

DAY v. NOTTINGHAM ET AL.

[No. 19,498. Filed April 9, 1908.]

DIVORCE.—*Setting Aside Decree After Plaintiff's Death.*—The provision of §1042 Burns 1901, that "Parties against whom a judgment of divorce shall hereafter be rendered, without other notice than publication in a newspaper, may, at any time within two years after the rendition of such judgment, have the same opened, and be allowed to defend as well on the granting of the divorce as in relation to the allowance of alimony and the disposition of property," has no application where the party obtaining the divorce upon a citation to the defendant by publication is dead at the time the application to open the judgment is made, and where no question of alimony or property rights were involved in the divorce proceeding. pp. 415-417.

SAME.—*Nonresident Defendant.*—*Affidavit.*—*Publication.*—*Jurisdiction.*—In a suit for divorce against a nonresident, an affidavit by the plaintiff instead of by a disinterested person, as provided by

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§1048 Burns 1901, will not render a decree for plaintiff void for want of jurisdiction. *p. 418.*

DIVORCE.—*Notice by Publication.*—*Vacation of Decree.*—*Fraud.*—A decree for divorce against a nonresident defendant will not be set aside for fraud on the part of the plaintiff in making affidavit that the place of defendant's residence was unknown to her, where it appears that the defendant was in fact a nonresident, and that the notice by publication was made according to law. *pp. 418-423.*

From Superior Court of Tippecanoe County; *J. M. Rabb*, Special Judge.

Suit by Thomas Day against Thomas C. Nottingham and Thomas C. Nottingham, administrator of the estate of Julia Nottingham, deceased, and another, to set aside a decree for divorce. From a decree for defendants, plaintiff appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

A. L. Kumler and *T. F. Gaylord*, for appellant.

J. M. LaRue and *S. P. Baird*, for appellees.

JORDAN, J.—On January 28, 1899, this proceeding was instituted by appellant Thomas Day to have a decree of divorce granted to his wife, Julia Day, set aside and vacated. Under his complaint he sought to have the case as originally entitled, Julia Day v. Thomas Day, redocketed in the lower court, and one Thomas C. Nottingham, in his own proper person, together with Thomas C. Nottingham and Mortimer Levering, administrators of the estate of Julia Nottingham, formerly Julia Day, made parties to his said action.

The complaint is in four paragraphs. The first and second are based on §6 of our divorce statute, enacted in 1873, being §1042 Burns 1901. The first paragraph is as follows: "Your petitioner, Thomas Day, respectfully shows to the court that he is the defendant in the above entitled cause, and that on the 2d day of March, 1854, he and Julia Day, the plaintiff in the above entitled cause, were duly married at the city of Lafayette, in said county and State; that afterwards, on the 22d day of February, 1898,

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and while the said Thomas Day and Julia Day were husband and wife, the said Julia Day filed her complaint in this court for a divorce from said Thomas Day on the grounds of abandonment and failure to make reasonable provision for her for a period of two years; that afterwards such proceedings were had in such cause that by the judgment of this court, rendered therein on the 28th day of April, 1898, it was adjudged that the bonds of matrimony then existing between the said Julia Day and Thomas Day be dissolved, annulled, and set aside, and that said Julia Day be granted a divorce from said Thomas Day. Your petitioner further avers that no summons was ever issued or served on him in said cause; that he received no actual notice of the pendency of said action in time to appear in court at the time of the trial and object to said judgment; and that he did not appear to said action, or at the trial thereof, and had no notice or knowledge whatever of the bringing or pendency of said action or the proceedings or judgment therein until during the month of November, 1898; that for many years prior to the commencement of said action for divorce, and continuously therefrom up to the present time, the said Thomas Day has resided at Shingle Springs, in the state of California; that the only notice given or attempted to be given of the pendency of said action for a divorce was by publication in the Lafayette Call, a weekly newspaper of general circulation, printed and published at the city of Lafayette, in said county of Tippecanoe. Your petitioner further avers that the complaint in said action for divorce falsely charged that the said Thomas Day abandoned said Julia Day and failed to make reasonable provision for her for a period of two years, and upon that ground alone said divorce was granted, when, in truth and in fact, the said Thomas Day and Julia Day lived separately and apart, each providing for their own wants by mutual consent and agreement, until the spring of 1897, when they met at the residence of said

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Thomas Day, at Shingle Springs, in the state of California, and mutually agreed to live together again as man and wife, and the said Julia Day was at no time in need of nor did she ever ask assistance from said Thomas Day, and that said charge of abandonment and failure to provide as averred in said complaint for divorce was false and untrue, as the said Julia Day well knew; and that, if your petitioner had known of the pendency of said action, he would have appeared and successfully defended said action. Your petitioner further avers that said Julia Day departed this life, intestate, on the — day of August, 1898, at Shelby county, in the state of Tennessee, leaving therein personal property of the value of \$500, and leaving in said county of Tippecanoe personal property of the value of \$9,000 over and above all indebtedness; that she left surviving her as her sole and only heir at law your petitioner herein; that one Thomas C. Nottingham claims that on or about the 14th day of May, 1898, he and the said Julia Day were married, and that said Julia Day left her surviving as her sole heir at law, him, the said Thomas C. Nottingham. Your petitioner further shows to the court that the said Thomas C. Nottingham was, on the — day of September, 1898, by the consideration of the probate court of Shelby county, in the state of Tennessee, appointed administrator of the estate of the said Julia Day, by the name of Julia Nottingham, and that one Mortimer Levering was on the 30th day of November, 1898, by the consideration of the circuit court of said Tippecanoe county, appointed administrator of the estate of said Julia Day, by the name of Julia Nottingham, and that the said Nottingham and said Levering are now the duly qualified and acting administrators of her said estate. And your petitioner further shows that the aforesaid Thomas C. Nottingham and Thomas C. Nottingham, administrator as aforesaid, now resides in said county of Shelby, in the state of Tennessee; and that said Mortimer Levering, administrator as aforesaid,

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resides in said county of Tippecanoe in the State of Indiana. Wherefore your petitioner prays that said action of Julia Day be redocketed, and that said Thomas C. Nottingham, Thomas C. Nottingham, administrator as aforesaid, and Mortimer Levering, administrator as aforesaid, be made parties to this petition; that the court fix the notice it deems proper to be given said parties; and that the judgment of divorce granted to said Julia Day, as aforesaid, be vacated and set aside, and for all other proper relief."

The second paragraph of the complaint contains substantially all the averments of the first, and assails the jurisdiction of the court in the divorce proceedings, on the ground that the order for notice by publication was obtained upon a false affidavit, by which knowledge to the defendant in the aforesaid divorce suit was sought to be prevented by the plaintiff therein, Julia Day.

The third paragraph contains all of the allegations of the first, except that no attempt is made to show a defense to the action for divorce. This paragraph proceeds upon the theory that the judgment in the divorce action is void for want of jurisdiction, for the reason that the affidavit for publication was made by the plaintiff in said action instead of being sworn to by a disinterested person, and did not state that the defendant was a nonresident of the State of Indiana. No attempt appears to have been made to show by the averments of this paragraph that appellant had a meritorious defense to the action for divorce. This third paragraph, also, among other things, sets out in full the affidavit as to the defendant's residence, and the order of the court that publication be made, and the finding and judgment of the court therein, and avers that they were the only findings, orders, and judgment of the court in said cause. This paragraph also charges that the plaintiff did not at any time file an affidavit stating the place of residence of the said Thomas Day, if known, and, if unknown, so stating, as required by §1048 Burns 1901. The

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affidavit as to the residence of the defendant in the said divorce proceeding is set out in this paragraph as follows: "State of Indiana, Tippecanoe County, ss.—In the Superior Court. January Term, 1898. Julia Day v. Thomas Day. Affidavit as to the residence of defendant. Julia Day, plaintiff in the foregoing action, being duly sworn upon her oath, says: That a cause of action exists against said defendant Thomas Day; that the object of the action is to obtain a divorce by the plaintiff from the defendant for the reasons alleged in her petition filed in this action; that the residence of said defendant Thomas Day, upon diligent inquiry, is unknown to said plaintiff herein; and further says not. Julia Day. Subscribed and sworn to before me this 21st day of February, 1898. D. H. Flynn, clerk."

Upon the filing of the aforesaid affidavit it is alleged that the court entered the following finding and order, to wit: "And it appearing from said affidavit that the residence of said defendant, upon diligent inquiry, is unknown to her, the court thereupon orders that said cause be now docketed as an action pending, and the clerk of this court give said defendant notice of the pendency of this suit by publication for three successive weeks in a weekly newspaper of general circulation, printed and published in said county of Tippecanoe, and State of Indiana, requiring said defendant to be and appear in said court and make answer to the complaint herein on or before Wednesday, the 27th day of April, 1898, pursuant to the precept indorsed thereon; and day is given." That pursuant to said order of the court the clerk of said court caused to be published in the Lafayette Weekly Call, a newspaper of general circulation, printed and published in the English language, in said county of Tippecanoe, for three weeks successively, viz., February 26, 1898, March 5, 1898, and March 12, 1898, the following notice of publication, to wit: Nonresident notice. State of Indiana, Tippecanoe County, ss. In the Superior

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Court. March term, 1898. 7230. Julia Day v. Thomas Day. Petition for divorce. Be it remembered that on this 22d of February, A. D. 1898, the above named plaintiff, by John D. Gougar, her attorney, filed in the office of the clerk of said court her complaint against the defendant, and also her affidavit that the residence of said defendant Thomas Day, upon diligent inquiry, is unknown to her, and said defendant, whose residence is unknown, is therefore hereby notified of the pendency of said suit, and that said cause will stand for trial at the March term of said court, 1898, and on Wednesday, April 27, 1898, being the forty-fifth judicial day of said term. Witness my hand and seal of said court affixed at office in Lafayette on this 22d day of February, A. D. 1898. David H. Flynn, clerk."

Upon proof of publication being made to the satisfaction of the court, the defendant Thomas Day was defaulted. Upon the trial of said action the court found and decreed as follows: "And it appearing to the satisfaction of the court from said copy of notice and affidavit of publication annexed thereto as aforesaid that the defendant Thomas Day has been duly notified of the pendency of this action by three successive weekly publications of said notice in the Lafayette Weekly Call, a newspaper of general circulation printed and published in the English language in the county of Tippecanoe and State of Indiana, the last of which publication was made more than thirty days before the 27th day of April, 1898, the day fixed and indorsed on the complaint of said plaintiff requiring the defendant to appear to the action, on motion of the plaintiff the defendant is three times audibly called, and comes not, but herein wholly makes default; and on plaintiff's motion this cause is now submitted to the court for trial without the intervention of a jury; and the court, after hearing the evidence, and being advised in the premises, finds for the plaintiff, and that she is entitled to a decree of divorce from the defendant

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on **the** grounds alleged in her complaint, and that she pay the **costs** and charges in this behalf. It is therefore considered, adjudged, and decreed by the court that the bonds of **ma**trimony existing between this plaintiff and defendant be, **and** hereby are, dissolved, annulled, and set aside, and the **plaintiff** be, and hereby is, granted a divorce from the defendant. And it is further ordered that the plaintiff pay the **costs** and charges in this behalf."

The fourth paragraph of the complaint contains all of the **material** allegations of the former paragraphs, and sought to avoid the judgment in the divorce action on the ground of fraud on the part of the plaintiff in concealing the **residence** of the defendant from the court. The complaint was supported by the affidavit of Thomas Day, stating that he had no actual notice of the pendency of the action for divorce, and was further verified in respect to the **alleged** meritorious defense which he had in the divorce proceedings. The appellees separately demurred to each paragraph of the complaint. These demurrers were sustained by the court over appellant's exceptions, and, he refusing to further plead, the court rendered judgment on demurrer. The errors assigned are based on the rulings of the court in sustaining these several demurrers.

The contentions of counsel for appellant, among others, are: (1) That the right to open or vacate a judgment of **divorce** where notice has been by publication is expressly conferred by §1042 Burns 1901; (2) that a defendant under said section need only show that he had no actual notice of the pendency of the action in time to appear and object to the judgment, and that he had a meritorious defense to the action for divorce; (3) that decrees of divorce may be set aside for fraud in obtaining them, even after the death of one of the parties, and where a new marriage has been contracted by the party securing the divorce.

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It will be observed that each paragraph of the complaint is silent as to whether Mrs. Day, the plaintiff in the divorce action, was the owner of any property either real or personal at the time the judgment in the divorce suit was rendered. Each paragraph discloses that after she obtained the divorce from appellant in April, 1898, she in May following was married to Thomas C. Nottingham, in the state of Tennessee, and died, intestate, in Shelby county, in the said state, in the month of August, 1898, leaving in said county personal property of the value of \$500, and leaving also in the county of Tippecanoe, Indiana, personal property of the value of \$9,000. Thomas C. Nottingham, her surviving husband, it appears, was by the proper court in the state of Tennessee appointed administrator of her estate, and Mortimer Levering was also appointed administrator of her estate by the circuit court of the county of Tippecanoe, Indiana, and these two administrators were made parties to the application to set aside the judgment in the divorce proceedings. The language of the statute upon which appellant bases the first and second paragraphs of his application or complaint, is as follows: "Parties against whom a judgment of divorce shall hereafter be rendered, without other notice than publication in a newspaper, may, at any time within two years after the rendition of such judgment, have the same opened, and be allowed to defend as well on the granting of the divorce as in relation to the allowance of alimony and the disposition of property." §1042, *supra*. Certainly this provision of the statute contemplates that both of the parties in the divorce proceedings shall be living at the time the application is made to open the judgment or decree, and that when the judgment is set aside or vacated the action shall remain pending in court as originally instituted, and the defendant be allowed to interpose a defense to the merits of the action. The provision in question can have no application to a case as the one at bar, where the party obtaining the divorce

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upon a citation to the defendant by publication is dead at the time the application to open the judgment is made, for, under such circumstances, his or her death has forever separated the parties beyond any controversy in regard to their marital relations.

The action instituted by Mrs. Day appears to have been for the sole purpose of securing a divorce—no questions of alimony or property rights apparently were involved. The judgment rendered by the court in the action in question only professes to dissolve the relations of husband and wife which existed at the time between her and appellant. It was wholly *in rem*. While the court decreed a divorce in favor of the plaintiff, it adjudged that the latter pay the costs. Whatever right of action which she had in the suit in question was wholly personal to her, and there is no provision of the statutory law of this State to rescue such right or cause of action from the application and force of the principle asserted by the maxim, *actio personalis moritur cum persona* (a personal right of action dies with the person). From the very nature or character of the case in controversy the death of Mrs. Day, the complainant, must be held to have terminated all further proceedings in the matter, and if the judgment awarding her the divorce were set aside there would remain no pending action in court in which appellant, under the provisions of the statute in question, might appear and defend in regard to the merits thereof, for certainly her death rendered the mere right to a divorce no longer contestable; for whatever right she may have had in that respect died with her person, hence, her administrator could not be substituted as a plaintiff in the action. The following authorities, among others, fully sustain our conclusion as to the interpretation or construction which we place on the above provision of our statute pertaining to divorces. *Kirschner v. Deitrich*, 110 Cal. 502, 42 Pac. 1064; *Swan v. Harrison*, 42 Tenn. 534; *Owens*

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v. *Sims*, 43 Tenn. 544; *Kimball v. Kimball*, 44 N. H. 122, '82 Am. Dec. 194; *O'Hagan v. Executor of O'Hagan*, 4 Iowa 509; *Barney v. Barney*, 14 Iowa 189; *Zoellner v. Zoellner*, 46 Mich. 511, 9 N. W. 831; 2 Bishop, Mar., Div. & Sep., §687, and cases cited in footnote 3. For the reasons stated we concluded that the court did not err in sustaining the demurrers to the first and second paragraphs of appellant's complaint or application.

Counsel for appellant, under the third paragraph of the application, contend that the judgment awarding the divorce in question should be declared void for want of jurisdiction apparent on the face of the record. It will be observed that the order for publication in the case in question was made by the court in term time, and not by the clerk in vacation. The contention, however, is advanced that by reason of §12 of our statute in regard to divorces, being §1048 Burns 1901, which provides: "If it shall appear by the affidavit of a disinterested person that the defendant is not a resident of this State, the clerk shall give notice of the pendency of such petition, by publication," etc., is jurisdictional, and if made by a person not disinterested it is not sufficient to confer jurisdiction upon the court.

The contention of counsel for appellee is that the affidavit made in the divorce proceeding is a strict compliance with the provisions of §320 Burns 1901, which is a part of the civil code of 1881, and was reenacted by amendment in 1885. It is claimed by counsel for appellee that inasmuch as this section is a later enactment than the divorce statute, it controls. Section 320, *supra*, provides for a citation or notice by publication "in either of the following cases shown by affidavit: * * * (3) where the defendant is not a resident of the State, and the cause of action is * * * to obtain a divorce; * * * (4) where the residence of any defendant upon diligent inquiry is unknown." It would seem that the court in ordering that publication be made possibly recognized the

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right or authority to proceed under §320, *supra*, in respect to warning the defendant by publication of the pendency of the action. Whether the court erred in holding that the procedure leading up to the publication of the notice to the defendant should be under §320, *supra*, instead of requiring that the affidavit filed for publication of the notice should conform to the provisions of the divorce act, we do not, nor need not, decide, as it is unnecessary to the solution of the question as herein presented and involved. It may be said in passing, however, that there was room at least for the court to have made a mistake in respect to which of the two statutes was the proper one under which to proceed in respect to the order for publication.

It will be seen that appellant in his complaint admits as a fact that at the time the divorce action was instituted by his wife he was and had been prior thereto a resident of the state of California; consequently he was not a resident of the State of Indiana. Conceding, therefore, that the affidavit in dispute was not sufficient, as insisted by appellant, nevertheless the notice or citation given to the defendant to appear in the action by the method of publication was, under the facts, a substantial compliance with the provisions of §1048 Burns 1901, of the divorce statute; therefore the contention of appellant's counsel that the court did not have jurisdiction to decree a divorce in favor of the plaintiff for the reason that the affidavit was not sufficient and was irregular can not be sustained, for, under the conceded facts that appellant at the time was a nonresident of this State, the method of citing or warning him of the pendency of the action substantially filled or responded to the requirements of the law; hence he is afforded no grounds in this action for asserting that the judgment is void for want of jurisdiction by reason of the irregularity or insufficiency of the affidavit. The judgment of divorce in the action in question was, as we have shown, wholly *in rem*, and the vital essential in the matter was that the

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court should have jurisdiction over the *res* or subject-matter of the proceeding. That it had such jurisdiction by reason of the plaintiff being a *bona fide* resident of the county and state within which the action was instituted, as required by the divorce act, is not disputed. The court having such jurisdiction acquired the further right or authority to grant the divorce in question by reason of the publication of the notice or citation to the defendant. The affidavit was in the nature of evidence before the court. If the court, as it apparently did, held the document in its judgment to be sufficient to authorize the order of publication, its order in the premises, even though the affidavit was not sufficient, would simply be an error not affecting its jurisdiction. As the court, under the facts, awarded the proper notice to the defendant of the pendency of the action upon what counsel contend was a defective and irregular affidavit, the most which can be imputed to the order or judgment of the court in the premises is that it was erroneous, but not void, and such error, if any, can only be taken advantage of on appeal or by complaint for review. *Dowell v. Lahr*, 97 Ind. 146; *Carrico v. Tarwater*, 103 Ind. 86; *Stevens v. Reynolds*, 143 Ind. 467, 52 Am. St. 422; *Haynes v. Oldham*, 3 B. Mon. 266; *Banta v. Wood*, 32 Iowa 469; Van Fleet, Collat. Attack, §330.

The author of the work last cited, in the section mentioned, says: "If the object of process and service is to notify the defendant that a suit is pending against him in a designated court, * * * then when the residence or whereabouts of the defendant is such, that the process actually issued and published is the proper one, the entire absence of all preliminaries is a matter of no concern to him, and on principle, can not make the judgment void. The publication made gives him the same information, no matter on what evidence or by whom ordered."

Appellant does not contend that the notice made by publication in the case, in form or substance, or in length of

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time during which it was published, was in any manner defective or insufficient. The notice given, if the defendant read it, fully informed him of the pendency of the action. It gave the name of the plaintiff and the court in which the action was pending and the time when he was required to appear and answer. As he did not take any appeal in the action, and as a review of a judgment in a divorce proceeding is positively forbidden by our statute, consequently, under the circumstances, he is not in position to assail the judgment of the court by reason of the mere defects or irregularities which he imputes to the affidavit in controversy. Appellee urges that the paragraph in question is insufficient for other reasons, but as to these we do not deem it necessary to decide. It follows that the third paragraph of the application is insufficient, and the demurrers thereto were properly sustained.

The fourth paragraph of appellant's application seeks to set aside the judgment in the divorce proceeding on the ground that the plaintiff therein was guilty of fraud in imposing upon or misleading the court by means of the false statements in the affidavit which she filed that the residence of her husband was unknown to her. While it is against the policy of the law as a rule to disturb the judgment in divorce proceedings, still we recognize the well settled doctrine that a decree or judgment in such cases may, in a direct proceeding for that purpose, be set aside or vacated on the application of the injured party, where the judgment has been procured by the fraud of the party in whose favor it was rendered, or where such party has been guilty of fraud or trickery in preventing his or her adversary from being notified of the pendency of the action as required by law, or in preventing him from appearing therein or from defending the action. This right in some cases is accorded to the injured party even where the complainant in the divorce proceeding is dead or has remarried. But in such cases the court will be extremely cautious in the

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exercise of its power to vacate the judgment, and the application to set aside must be timely made, and must present a strong case of fraud, in order to justify the court in disturbing the judgment. *Earle v. Earle*, 91 Ind. 27; Black, Judgments (2d ed.), §320; 2 Bishop, Mar., Div. & Sep., §1563.

If it be conceded as true that Mrs. Day in her divorce proceeding made a false affidavit to the effect that the residence of her husband at the time was unknown to her, such act on her part does not appear to have affected the court in respect to the notice which it ordered to be given to the defendant. The fourth paragraph of the complaint discloses, as do the others, that at the time the divorce action was instituted and for a long time prior thereto appellant was a resident of the state of California; therefore his wife's alleged fraud in making the affidavit resulted in no harm to him, for he was, under the order of the court, constructively warned or notified of the pendency of the action, as the law prescribes. Having been given such notice as the law under the circumstances exacted, the alleged falsity of the affidavit in question can not, in a legal sense, be said to have resulted in any harm or injury to him. The rule is well settled that no one is in a position to demand relief upon the ground of fraud upon the part of another, unless he establishes that he has suffered an injury specially to himself. This rule applies in proceedings to set aside a fraudulent divorce judgment. The alleged invalidity of such a judgment by reason of the fraud will not be inquired into by the court on the application of a party whose rights are not shown to have been specially affected by the fraud. 2 Bishop, Mar., Div. & Sep., §1543.

Under §320 Burns 1901, a plaintiff is not required in the affidavit filed for publication to give the particular place of the defendant's residence; hence, if Mrs. Day, in making the affidavit in question was proceeding, as it appears she was, under that section of the civil code, she could not be

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charged with being guilty of actionable fraud in failing to state in the affidavit what the law did not require. It can not be asserted that the judgment in the divorce case affected anything more than the mere status of the parties. It is not disclosed that any property rights were involved. It does not appear that the wife had any property in her own right at the time she obtained the divorce. It may be assumed, as nothing to the contrary appears, that the personal property which she left at her death may have been acquired by her after her divorce. Possibly it may have been settled upon her by the man whom she married after the divorce was granted. As previously shown, if the decree or judgment in question were set aside it would necessarily follow, by reason of the death of the complainant, that there would be no action pending nor anything for appellant to contest or defend. Under such circumstances the vacation of the judgment could only avail him to the extent of permitting him to become the inheritor of the personal property left by the deceased. The complaint at least inferentially shows that appellant lived separate and apart from his wife during the greater part of their married life. Possibly, therefore, if it were not for the property in question, the judgment of divorce would be of no great concern to appellant. In such a case as this, under the circumstances, a court of justice will be cautious and hesitate in granting the relief sought by the applicant, where it does not clearly appear that he is acting from good motives, and not for some expected personal advantage. *Singer v. Singer*, 41 Barb. 139; *Earle v. Earle*, 91 Ind. 27.

The cases of *Willman v. Willman*, 57 Ind. 500, and *Brown v. Grove*, 116 Ind. 84, 9 Am. St. 823, cited by appellant, are not applicable to the case at bar. In both of these latter cases it was, under the facts, shown that the court granting the divorce was absolutely without jurisdiction, and that, therefore, the judgment was void.

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The fourth paragraph of the application is insufficient on demurrer. We conclude that the judgment in the divorce proceeding in question is valid and binding against appellant.

The judgment of the lower court is affirmed.

CONSUMERS PAPER COMPANY v. EYER.

[No. 19,996. Filed April 10, 1903.]

APPEAL AND ERROR.—*Court Rules.*—*Briefs.*—*Waiver.*—Under rules twenty-one and twenty-two of the Supreme Court requiring an appellant to file his brief within sixty days after the submission of the cause and state therein the errors relied upon for reversal, points not stated therein are waived and cannot be presented in a brief subsequently filed purporting to contain a citation of additional authorities. *p. 427.*

SAME.—*Constitutional Question.*—A constitutional question will not be decided, where the cause can properly be disposed of otherwise. *p. 427.*

MASTER AND SERVANT.—*Employers' Liability Act.*—*Orders Given by President of Corporation.*—In an action by an engineer for personal injuries, the evidence showed that the president of defendant corporation, in the absence of the superintendent, had ordered the engineer to light the gas in the furnaces, and while he was complying with such order the president negligently opened a large valve which caused an explosion, injuring plaintiff. *Held*, that the evidence authorized the finding that plaintiff was bound to conform to the orders of the president. *pp. 427-431.*

SAME.—*Employers' Liability Act.*—*Negligence of President.*—Where an employe was injured while complying with an order given him by the president of the corporation by the negligent act of the president in turning a gas valve, the corporation is not relieved from liability by reason of the fact that it was not a part of the duty of the president to operate the valve or to assist in the operation of the machinery in the plant. *pp. 429-431.*

SAME.—*Negligence.*—*Imputed Knowledge of Master.*—A complaint for personal injuries to an employe while lighting the gas under a boiler caused by the alleged negligence of the president, to whose orders the employe was conforming when injured, alleged that the president turned on the gas from a large main knowing the valve connecting the same with the furnace he had ordered plaintiff to light was open. The jury found that the president was informed by another employe before he turned on the gas that the

160	424
164	408
164	652
180	424
167	209
160	424
169	9

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valve was closed, and that he believed it was closed when he turned the gas on. *Held*, that such finding was not necessarily inconsistent with the charge of knowledge in the complaint; since if the president turned on the gas without the degree of information that an ordinary prudent man would have regarded as sufficient to warrant such action, the law imputes knowledge to him that the valve was open. pp. 431, 432.

PLEADING.—*Amendment to Conform to Proof.*—*Presumption.*—Where the variance between the allegations of the complaint and the proof is not a matter of substance, the complaint, by reason of the requirement of §670 Burns 1901, must be deemed to have been so amended as to make the allegations conform to the proof. pp. 432, 433.

TRIAL.—*Offer to Prove in Presence of Jury.*—*Misconduct of Counsel.*—No available error exists because of an offer to prove an incompetent matter, made in the presence of the jury, where the offer was refused and the jury admonished by the court not to consider it. pp. 433, 434.

SAME.—*Misconduct of Counsel.*—*Exception.*—*Appeal and Error.*—Where no objection was made to alleged misconduct of counsel in argument to the jury, it is too late to raise the question for the first time on appeal. p. 434.

APPEAL AND ERROR.—*Harmless Error.*—*Trial.*—*Misconduct of Counsel.*—Alleged misconduct of counsel in suggesting to the jury, in argument, that certain interrogatories should be answered by the words "No evidence," was harmless where affirmative answers to such interrogatories would not have created an irreconcilable conflict between the answers to interrogatories and the general verdict. pp. 434, 435.

From Delaware Circuit Court; *J. G. Leffler*, Judge.

Action by Harry J. Eyer against the Consumers Paper Company. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed*.

James Bingham and *Jesse Long*, for appellant.

H. F. Wilkie, *Henrietta Wilkie*, *D. W. Crockett* and *G. H. Koons*, for appellee.

GILLETT, J.—Appellee recovered judgment against appellant in the court below. The action was to recover damages for alleged negligence.

It is first urged by appellant's counsel that the second paragraph of complaint, on which the cause was tried, is insufficient. It appears from said paragraph that appellee

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was an employe of appellant, a corporation, and that, while in the exercise of due care, he was injured by the negligence of one Rush Evans, the president of said corporation, while conforming to an order of said Evans as such president, which order, it is alleged, appellee was bound to conform to. Section 7083 Burns 1901, commonly known as the employers' liability act provides: "That every railroad or other corporation, except municipal, operating in this State, shall be liable for damages for personal injury suffered by any employe while in its service, the employe so injured being in the exercise of due care and diligence, in the following cases: * * * (2) Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employe at the time of the injury was bound to conform, and did conform." In speaking of this subdivision, in *Louisville, etc., R. Co. v. Wagner*, 153 Ind. 420, 423, this court said: "It provides that when an injury results from the negligence of any person in the service of a corporation, to whose orders the injured party at the time was bound to conform and did conform, the injured party being himself without fault, the corporation shall be liable. The statute places the case upon a principle different from that in support of the co-servant's rule and the assumption of risk. The test here is threefold: (1) Was the offending servant clothed by the employer with authority to give orders to the injured servant that the latter was bound to obey? (2) Did the injury result to the latter from the negligence of the former while conforming to an order of the former that the injured servant was, at the time, bound to obey? (3) Was the injured party at the time of injury in the exercise of due care and diligence? If these three things concur, appellee exhibits a good cause of action."

In its principal brief, appellant contends that the president of a manufacturing corporation has no authority to participate in the practical operation of its plant. We need

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not at present decide this question, because the complaint makes a case within the literal terms of said subdivision.

In a brief subsequently filed by appellant, purporting to contain a citation of additional authorities, the point is made that, as applied to corporations other than railroad corporations, said act is unconstitutional. The point stands as waived under rules twenty-one and twenty-two of this court. The decision of a constitutional question is regarded by the court as profoundly important, and it is only where the point is duly presented, and the court can not otherwise properly dispose of a case, that it will decide such a question.

The next question in the order of argument is whether the court erred in overruling appellant's motion for judgment in its favor on the answers to the interrogatories that were submitted to the jury. We find that many of the points made by appellant on this branch of the case are reargued in discussing the sufficiency of the evidence. To the end that we may discuss the effect of answers to particular interrogatories in a manner that will be intelligible to persons not familiar with the record, and yet avoid the necessity of setting out all of said interrogatories and the respective answers thereto, we will first give an outline of the evidence: On December 29, 1899, appellant was engaged in the manufacture of strawboard in the city of Muncie. Appellee was at that time in the employ of appellant as an engineer, but it was his duty to do the work of the boiler tender when required. In appellant's mill was a battery of ten boilers, extending east and west, with furnaces under each of them. Natural gas was used as fuel in said furnaces. The gas was conveyed into said mill through an eight-inch main that terminated in the boiler room at a point in front of said battery—about the middle thereof. At this point there was connected with said main line a four-inch line that paralleled said battery, and connected with this line were individual three-inch lines, leading into said fur-

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naces. Said eight-inch main was also connected, a few inches back of the end thereof, with a line of one-inch pipe that extended to a point immediately in front of said battery, and was there connected with a one-inch line that ran parallel with said line of boilers, having individual three-quarter-inch pipes leading into the furnaces. The gas could be shut out of the four-inch line by a valve in the eight-inch line, and the individual lines, extending into the furnaces, including both the three-inch and the three-quarter-inch lines, had valves whereby the flow of gas through them could be stopped. All of said lines were beneath the floor of the mill, and only the valve-stems, with the wheels upon them, were above the floor. The three-quarter-inch lines were used in lighting the gas, and before opening the large valve the valves in the three-inch pipes were required to be closed. When the large valve was opened, the gas under a boiler being ignited, the fire could be increased to the extent necessary by means of the valve in the three-inch line.

On the afternoon in question the gas began to fail, owing to a break in the main line at some distant and unknown point in the country, and the superintendent and a force of men started to discover and repair said break. It was, of course, not known when they would return. The gas was shut off from the seven south furnaces. The day was cold, and at half past four the gas had so far failed that the power was gone and only a small jet was burning in the boiler room. There was no fire in the adjacent office building of the mill. It was growing dark, and as the mill had its own electric lighting system, that was dependent upon such power, the electric lights would not burn. At this time, the president of appellant, one Rush Evans, came into the boiler room and inquired whether there was any other fuel. He was informed that there was none. He then asked whether there was any danger of freezing, and appellee answered that he thought that nothing would freeze before midnight. Evans expressed his vexation that others

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should discover that the gas had failed, and cautioned the men to be very careful, as the gas might suddenly come on. It seems to have then occurred to him that gas might be obtained from an abandoned well in the vicinity, as he sent the boiler tender—one John Young—to make the experiment. There was soon a heavy pressure of gas in the main line, as indicated by said gas light blazing up, and Evans then said to appellee: "Harry, light up. Let's get the good of it." Appellee, who testified that he had observed Young close the large valve, proceeded to obey said order. He lighted the gas under the north furnace, closed the three-inch valve in front of said furnace, and was about to open the door of the next furnace, when Evans said: "I will give you the gas, Harry;" and, suiting the action to the words, he opened the eight-inch valve. Appellee, hearing the remark, exclaimed: "Hold on! Don't!" He attempted to escape, but before he could do so an explosion occurred from said gas, seriously injuring him.

The appellant is a foreign corporation, and on the day in question, there was no member of the board of directors (other than Evans) in the State. Evans had not before superintended the operation of the mill, in the sense of giving orders directly to the men, but, to use his expression while upon the stand, he "had a general oversight of the business, and kept the thing going." There are some further items of evidence that we will mention in connection with a discussion of the particular points that they relate to.

The question is presented upon the evidence as to whether the appellant was responsible for the injury to appellee, in view of the fact that it is not shown that Evans had been delegated the power to superintend the operation of the mill. There seems to be an absence of authority upon the question as to the power of the president of a manufacturing corporation directly to superintend the practical operation of the plant. All of the cases that we have been able

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to find relative to the power of the president of a corporation relate to his power to contract. There is no doubt that his authority is much more circumscribed than is popularly supposed. *National State Bank v. Vigo County Nat. Bank*, 141 Ind. 352, 50 Am. St. 330. In this case, however, the question as to the president's authority to turn the large valve need not be decided. The question to be determined is whether the evidence authorized the finding that appellee was required to conform to the order of Evans, as president, to light the gas under the furnaces.

The duties of a president are ordinarily executive in their character, and, if the superintendent had been present, there is no doubt that the president, through the superintendent, might have ordered the fires started in the furnaces. Could the president, under the circumstances of this case, lawfully give the order directly to the employe? It is a fair implication from the nature of the employment that the president of a corporation, who is assigned the duty of exercising a general supervision over a business of the character in question, is empowered, in the absence of the board of directors, to give a clearly proper order to an employe in an emergency, the superintendent not being present. It is urged that there was no real emergency for the giving of the order. There was a situation that approximated an emergency, and it seems to have been a situation that caused anxiety upon the part of Evans. We think, if Evans is to be presumed to have had any authority to act in an emergency, that, under the circumstances, it was for him to judge of it, at least to the extent of giving an order that was of a routine character to the employe accustomed to perform such duty. With the plant shut down, and darkness approaching, and with the menace of injury to the property not many hours away if heat and power could not be obtained, and the superintendent absent for an indefinite time, it would be the height of unreason to infer that the president of the corporation could not directly speak the

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word that if communicated through the ordinary channel would be required to be obeyed. There was no showing that the duty of superintendence was exclusively vested in the superintendent, and, as laid down by a leading writer on private corporations: "There seems to be no sound reason why the president of a corporation can not discharge the duties of many of the inferior ministerial officers of the company, if occasion requires it." Thompson, Corporations, §4653. The presumption is that the president has power to act as superintendent in an emergency, during the latter's absence, and this presumption is not rebutted by mere evidence that he had never before acted as superintendent. See *Jones v. Williams*, 131 Mo. 1, 39 S. W. 486, 40 S. W. 353, 37 L. R. A. 682, 61 Am. St. 436; *National State Bank v. Vigo County Nat. Bank*, *supra*.

In answer to interrogatory number 101, the jury found that it was not a part of the duty of the president of appellant to operate said valve, or to assist in the operation or running of the machinery in the mill. This interrogatory evidently refers to whether it was the duty of the president to perform acts of manual labor. It was not required, to create a liability, that the president should have had authority to turn said valve. At the moment in question it was rather his duty to refrain from so doing. The pertinent question in this connection is whether he had authority to give the order to light the gas. *Louisville, etc., R. Co. v. Wagner*, 153 Ind. 420.

The jury found specially that Evans was informed by Young before he turned the large valve, that the valves in the three-inch lines were closed, and it is insisted that this fact exculpates Evans from the charge of negligence. It was pertinent to show that Evans had been so informed, as a fact bearing on the question of his negligence, but it was not conclusive. Bearing in mind the extraordinary hazard that the turning of the large valve would subject appellee to if the three-inch valves were not closed, it was a question

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whether the man of ordinary prudence would have taken the chance of the statement being incorrect. It would have taken but a few moments longer to have tested each of the three-inch valves, to ascertain whether all were closed, and the jury very properly concluded, as evidenced by its general verdict, that, notwithstanding the statement of Young, the act of Evans in opening the large valve was negligent.

The finding of the jury that Evans believed that the three-inch valves were closed is not inconsistent, in legal effect, with the averment of the complaint that he well knew that the gas was shut off from the three north furnaces only by the valve or cut-off by which gas was shut off and prevented from entering the four-inch supply line. Having given the order, which appellee was obeying, it was the duty of Evans to refrain from doing an act that would place the appellee in a position of extraordinary hazard. *Louisville, etc., R. Co. v. Wagner, supra.* The charge of knowledge may be supported by proof of facts from which the law will impute knowledge, where there is an affirmative obligation to ascertain what the actual condition is; and if Evans opened the large valve without the degree of information concerning the condition of the three-inch valves that an ordinarily prudent man would have regarded as sufficient to warrant such action, the law imputes to him knowledge that the three-inch valves were open. *Evansville, etc., R. Co. v. Duel*, 134 Ind. 156; *Louisville, etc., R. Co. v. Miller*, 140 Ind. 685; *Consolidated Stone Co. v. Summit*, 152 Ind. 297; *Lake Erie, etc., R. Co. v. McHenry*, 10 Ind. App. 525.

The answers to interrogatories ninety-seven and ninety-eight at most suggest a variance between the averment and the proof. Whether the point of ignition was in front of furnace number ten, or whether the gas in furnace number nine was ignited by the flames from furnace number ten, were not matters of substance; and, if there was any variance in these particulars, the complaint must, by reason of

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the requirement of our code, be deemed to have been so amended as to make the allegation conform to the proof. §670 Burns 1901; *Evansville, etc., R. Co. v. Maddux*, 134 Ind. 571; 1 Works' Prac. (3d ed.), §727, and cases there cited.

It is objected that instruction number sixteen, relative to the measure of damages, is not based on the hypothesis of the jury's finding for the plaintiff on the other issues. Standing alone, the instruction is open to the objection urged; but when read as following instruction number fifteen, that presumptively immediately preceded it, it appears that the jury could not have been misled. These instructions relate to the same subject, and, when read in the order mentioned, they together constitute a substantially correct instruction. Instruction number five, tendered by appellant, did not contain a correct statement of the law as applied to the second subdivision of the employers' liability act. *Pittsburgh, etc., R. Co. v. Gipe, ante*, 360, and cases there cited.

The finding of the jury in answer to interrogatories numbered fifty-four and sixty-six renders it unnecessary to consider whether instruction number ten, tendered by appellant, should have been given. For the same reason no available error exists because of the refusal of appellant's instruction number eleven. We have already considered the question as to the effect of Young's statement to Evans. Appellant was not entitled to an instruction informing the jury, as a matter of law, that Evans had a right to rely on such statement.

Instructions numbered fourteen and sixteen, tendered by appellant, were given as asked. We find no available error in the instructions given or refused.

It is complained that counsel for appellee made an oral offer to prove in the presence of the jury concerning a matter that appellant's counsel deem clearly incompetent.

The offer was refused and the jury was admonished not to consider it. The court could not reasonably have gone further in its effort to protect appellant.

The evidence as to the kind of a torch that should be used in lighting the furnaces was irrelevant, but harmless. The gas had been lighted in furnace number ten without injury to appellee, and he was engaged in opening the door to the next furnace when the explosion occurred. The expert evidence on the subject of the condition that the valves should be in at the time of lighting the furnaces appears to us to amount to an attempt to prove points that were palpable, but we do not perceive in what manner appellant was prejudiced by the introduction of such evidence. There are a number of further points, of a minor character, relative to the admission and exclusion of evidence, that are suggested as grounds for a new trial. Without prolonging this opinion to discuss such points, we content ourselves with the statement that none of the rulings upon the evidence furnishes ground of reversal, either for the reason that the point is without merit, or because the question has not been properly saved.

Complaint is made that one of the attorneys for appellee was guilty of misconduct in suggesting to the jury, in argument, that certain interrogatories should be answered by the words, "No evidence." At the time in question the judge was in a room adjoining the court room dictating his instructions; the door was open, and it appears that a custom existed in the court below, of which appellant's counsel were advised, that when an objection was made under such circumstances all proceedings would be suspended and the judge would be notified, and return to the bench for the purpose of passing on the objection. Without passing on the propriety of the course pursued by the court in the conduct of its business, it is enough to say that after appellant had, without objection, taken its chance of securing a favorable result before the jury, it was too late to

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raise the question. *Coleman v. State*, 111 Ind. 563; *Robb v. State*, 144 Ind. 569; *Townsend v. State*, 147 Ind. 624, 37 L. R. A. 294, 62 Am. St. 477; *Blume v. State*, 154 Ind. 343. So far as the effect of such argument in producing the answers to interrogatories is concerned, it does not furnish ground of reversal, as affirmative answers would not have created an irreconcilable conflict between the answers to interrogatories and the general verdict. The evidence warranted the jury in finding the appellant liable under the theory on which the case was tried.

There is no error available in the record. Judgment affirmed.

THE PERRY, MATTHEWS-BUSKIRK STONE COMPANY v. WILSON.

[No. 20,025. Filed April 21, 1903.]

APPEAL AND ERROR.—*Briefs.*—*Waiver of Error.*—*Complaint.*—Where appellant failed to set forth in its brief a copy of the complaint, or the substance thereof, and the demurrer thereto as required by clause five of rule twenty-two of the Supreme Court, an assignment based upon the action of the court in overruling the demurrer to the complaint will be deemed waived. p. 437.

SAME.—*Briefs.*—*Interrogatories to Jury.*—*Waiver of Error.*—An assignment that the court erred in overruling appellant's motion for judgment on the answers to interrogatories notwithstanding the general verdict, is waived by failure of appellant to set out in its brief a copy of the interrogatories and answers, or the substance or a condensed recital of the answers, as required by rule twenty-two of the Supreme Court. p. 437.

SAME.—*Rules.*—*Briefs.*—Where clause 5 of rule 22 of the Supreme Court, requiring a concise statement of so much of the record as fully presents every error and exception relied on is wholly disregarded, the appeal will be dismissed; when the rule is disregarded in part, the questions will be decided to the extent the rule has been complied with. p. 438.

TRIAL.—*Interrogatories.*—*Failure to Answer.*—*Conflicting Evidence.*—*Verdict.*—Where in answer to an interrogatory the jury wrote "the evidence is conflicting," the court erred in overruling a motion to require the jury to answer the interrogatory, as it was the duty of the jury to answer the interrogatory according to the preponderance of the evidence the same as it was to render a general

160	435
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163	294
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164	375
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165	142
165	254
165	535
165	635

160	435
166	279
167	457

160	435
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verdict, and if there was no preponderance either way, the jury should have answered the same against the party having the burden of proof as to the fact inquired about, and, if unable to agree upon the answer, they should have reported the same to the court and the court should have discharged them on account of such disagreement, the same as where the jury can not agree upon a general verdict. pp. 438, 439.

TRIAL.—*Misconduct of Counsel.*—Statements made by counsel for plaintiff, in argument to the jury, in an action against a stone company for personal injuries, showing the large number of men killed in quarries, and that public policy demanded that the juries assess such damages against all the parties, and against this defendant in particular, as would fully compensate for all damages sustained, in order to compel the owners of stone quarries in general, and this defendant in particular, to exercise more care in the management of the quarries, were improper, and prejudicial to the rights of defendant, and should have been withdrawn from the jury, upon motion of defendant, and the jury instructed to disregard the same. pp. 439-441.

From Monroe Circuit Court; *Newton Crooke*, Special Judge.

Action by Walter A. Wilson against the Perry, Matthews-Buskirk Stone Company. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Reversed.*

H. C. Duncan and *I. C. Batman*, for appellant.

J. R. East, *R. H. East* and *McHenry Owen*, for appellee.

MONKS, J.—This action was brought by appellee to recover damages for personal injuries received by him while in appellant's employ in its stone quarry as a "breaker" or "capper." A trial by a jury resulted in a general verdict against appellant in favor of appellee.

It is claimed by appellee that neither the complaint, demurrers, nor answers are properly in the record. The reasons urged by appellee to sustain this contention are the same as those urged by the appellee in *Southern Ind. R. Co. v. Martin*, ante, 280, and upon authority of that case we hold that the pleadings are properly in the record.

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The errors assigned and relied upon for reversal by appellant are: (1) The court erred in overruling appellant's demurrer to the third paragraph of complaint; (2) the court erred in overruling appellant's motion for a judgment in its favor on the answers of the jury to the interrogatories notwithstanding the general verdict; (3) in overruling appellant's motion for a new trial.

On account of appellant having failed to set forth in its brief a copy of the third paragraph of the complaint, or the substance thereof, and the demurrer thereto, as required by clause five of rule twenty-two of this court, the first assignment of error is waived.

Appellant has not set forth in its brief a copy of the interrogatories and answers of the jury thereto, nor is the substance of said answers or a condensed recital thereof contained in said brief as required by said rule. Some cases require the exact language of pleadings, interrogatories, etc., and in others the substance may be sufficient. Elliott, App. Proc., §440. For this reason the second error assigned is waived.

All but two of the grounds assigned for a new trial are waived for the same reason.

When said rule is properly complied with, all the questions presented by the assignment of errors can be determined by an examination of the briefs.

It was said by this court, in *McElwaine-Richards Co. v. Wall*, 159 Ind. 557: "The evident purpose of rules twenty-two and twenty-three in requiring that the appellant and appellee shall make the respective statements therein mentioned, was to relieve the court of the labor of searching the record in order to ascertain whether the errors complained of are sustained thereby. It will be observed that rule twenty-three exacts of the appellee the duty in his brief to point out any omissions or inaccuracies in the statement made by appellant in respect to the record. It is evident, therefore, that these respective rules subserve

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another important purpose in the furtherance of business pending in this court; that is, that all of the members thereof will be enabled to consider the errors involved through and by means of an examination of the respective briefs, without necessarily being required to resort to an inspection of the transcript." If this rule is wholly disregarded in an appeal, the result is a dismissal, the same as if no brief had been filed within sixty days after submission, as required by rule twenty-one. *Portland Co. v. United States*, 15 Wall. (U. S.) 1, 21 L. Ed. 113; *Beck v. O'Connor*, 21 Mont. 109, 114, 115, 53 Pac. 94; *Heath v. Silvertown, etc., Co.*, 39 Wis. 146, 159; *Huffman v. Chicago, etc., R. Co.*, 86 Wis. 471, 56 N. W. 1093; *Smith v. Wells Mfg. Co.*, 144 Ind. 266, 270, 271; *Stephens v. Stephens*, 51 Ind. 542; Ewbank's Manual, §§21, 179, 222. When the rule is not wholly disregarded, the questions presented by the assignment of errors, to the extent the rule is complied with, will be determined, and the others will be considered waived. *Pittsburgh, etc., R. Co. v. Wilson* (Ind. Sup.), 66 N. E. 899, and cases cited.

The jury wrote, as an answer to interrogatory number thirty-nine, submitted by the court, "The evidence is conflicting." No answer was made to interrogatory number forty, which was to be answered in the event the thirty-ninth was answered in the affirmative. These interrogatories were upon the question of appellee's knowledge of the defect in the stone, the fall of which injured him, and his opportunity of knowing of such defect. Appellant at the proper time asked that the jury be required to answer said interrogatories, and objected to the discharge of the jury until the same were answered. The court overruled said motion and discharged the jury, to which rulings of the court appellant objected, and assigned the same as causes for a new trial. If there was no evidence on the subject embraced in the interrogatories, then the jury might

have answered, "no evidence;" but, if there was a conflict in the evidence on that subject, it was the duty of said jury to answer the same according to the preponderance of the evidence, the same as it was to render a general verdict. If there was no preponderance either way, then the jury should have answered the same against the party who had the burden of proof as to the fact inquired about. If the jury were unable to agree upon the answers to said interrogatories, it was their duty to report such fact to the court, and, if finally unable to agree, the court should have discharged the jury on account of such disagreement, the same as in a case where a jury can not agree upon a general verdict. In such case there is no verdict returned. *Maxwell v. Boyne*, 36 Ind. 120, 126; *Rowell v. Klein*, 44 Ind. 290, 293, 294, 15 Am. Rep. 235. It is evident that the court erred in not requiring the jury to answer said interrogatories.

Counsel for appellee, in the opening argument to the jury, spoke of the necessity of the jury finding for appellee, in order to make the stone quarry companies more careful, and "spoke of a man named Moore, at Mitchell, who had been killed by a falling stone in a quarry; and of a man killed in the same way in appellant's quarry within the last two months; of a man named Jenkins, who had been killed within the last two weeks in a stone quarry a short distance north of town; of a man who had been killed and three men who had been injured within the past week in a stone quarry a short distance south of town by the falling of a 'traveler,' which said attorney said was 'rotten;'" that public policy demanded that the juries assess such damages against all these parties, and against this defendant in particular as will fully compensate for all the damages sustained, in order to compel the owners of stone quarries in general, and this defendant in particular, to exercise more care in

the management of the said quarries; further saying that in no other way could owners of stone quarries in general, and this defendant in particular, be induced to exercise that care and caution that the law required, and asking the jury if they would give this man what is right, or would say: 'Go on killing men; go on rolling stones down on men and killing them.'” Objections were made to said statements of counsel, and the court was asked to withdraw the same from the jury, which objection and motion to withdraw said statements were made at the proper times, and overruled by the court, to which rulings proper exceptions were taken.

• The statements of counsel complained of were outside the record, and were calculated to prejudice the rights of appellant. Whether employees were injured in other quarries in that vicinity, or in the quarry in which appellee was injured, could not affect the liability of appellant in this action. Appellee's right to recover depended upon the evidence properly admissible under the issues, and he had no right to recover merely because employees in the same or other quarries had been injured.

If appellee had been permitted, over objection, to introduce evidence as to the injury of the persons named by counsel for appellee, the admission of such evidence would have been erroneous, and, unless shown by the record to have been harmless, would have constituted reversible error. The presumption is, that statements such as were made by appellee's counsel were prejudicial to appellant, and the burden is upon appellee to show by the record that no injury resulted. *Nelson v. Welch*, 115 Ind. 270, and cases cited; *St. Louis, etc., R. Co. v. Myrtle*, 51 Ind. 566, 576-580; *Campbell v. Maher*, 105 Ind. 383; *School Town of Rochester v. Shaw*, 100 Ind. 268, 270-273; *Rudolph v. Landwerlen*, 92 Ind. 34, 38-40; *Ferguson v. State*, 49 Ind. 33; *Brow v. State*, 193 Ind. 133, 136-138; *Chicago, etc., R. Co. v. Martin*, 28 Ind. App. 468, 471-473, and cases cited.

Baltimore, etc., R. Co. v. Harbin.

It was the duty of the court, when objection was made by appellant's counsel, if not before, promptly and unequivocally to withdraw such statements from the jury, and instruct the jury to disregard the same, and require appellee's counsel to desist therefrom. As was said by this court in *Nelson v. Welch*, 115 Ind. 270, 272: "When the party who is injured by the wrong calls for the intervention of the court by an objection, it will not do for the court to remain silent, leaving the matter of misconduct with the offending party and the jury. The court is bound to interpose when so called upon, and if an improper or injurious statement has been made without excuse, the effect of it should be erased from the minds of the jury then and there, by an emphatic and explicit admonition of the court. The jury should be made to understand that in making the statement counsel violated the propriety of his position, and that if they did not wholly disregard it they would violate their duties as jurors." No attempt was made by the court to correct or remedy said misconduct of counsel. It is clear, under the authorities, that the court erred in overruling appellant's said objection and motion.

Judgment reversed, with instructions to sustain the motion for a new trial.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY v. HARBIN.

[No. 20,027. April 22, 1903.]

CARRIERS.—Negligence.—Complaint.—A complaint against a carrier for injury to a passenger alleging that the train was so negligently managed that while running at a speed of ten miles an hour it was brought to a sudden stop and thereby with great force and violence threw plaintiff from his seat against the wall and floor of the car, states a cause of action, since it was the sudden stopping of the car that was complained of, not the speed thereof. p. 442.

160	441
168	625
160	441
168	476
168	478

Baltimore, etc., R. Co. v. Harbin.

TRIAL.—*Instructions.*—*Appeal and Error.*—*Harmless Error.*—The action of the court in giving and refusing to give instructions relating to a fact which the jury found did not exist, was harmless. *p. 443.*

From Knox Circuit Court; *O. H. Cobb*, Judge.

Action by Allen Harbin against the Baltimore & Ohio Southwestern Railroad Company. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

W. H. De Wolf, *E. H. De Wolf* and *Edward Barton*, for appellant.

W. A. Cullop and *G. W. Shaw*, for appellee.

HADLEY, C. J.—Suit by appellee to recover damages for injuries received by the alleged negligent management of the train upon which he was a passenger. A demurrer to the complaint was overruled. Answer by general denial. Trial by jury. Verdict and judgment for appellee for \$375.

The overruling of the demurrer to the complaint and of appellant's motion for a new trial are assigned as error.

The complaint is that the train was so negligently managed that, while running at a speed of ten miles an hour, it was brought to a sudden stop, and thereby with great force and violence threw the plaintiff from his seat against the wall and floor of the car, inflicting upon him serious and permanent injuries.

Appellant's objection to the complaint is that it charges no act of negligence, since no rate of speed, however high, can be said to be negligence, *per se*, as to passengers in the train. It will be observed that it is not the speed of the train, but the sudden stopping of the train that is the act complained of. We can not say, as a matter of law, that a train running at the rate of ten miles an hour may not be so abruptly and unreasonably stopped as to constitute negligence, and under a general charge that such act was negligence, the complaint, by many decisions of this court, must be held sufficient on demurrer.

Haymaker v. Schneck.

It is claimed that the court erred in refusing to give to the jury instructions, requested by appellant, numbered one, two, three, four, five, and six, and in the giving of said instructions numbered two, four, and five as modified. Number one was a direction to the jury to return a verdict for the defendant, and was properly denied. Numbers two, three, four, five, and six, as asked and refused, and numbers two, four, and five, as modified and given, were each based upon the assumption that the plaintiff had left his seat in the car, and at the time of his injury was standing in the passageway, while the answers to interrogatories returned with the general verdict find as a fact that immediately before his injury the plaintiff had not left his seat in the car, and did not leave it until thrown out of it by the sudden stopping of the car.

We think number five, as originally requested, contained a correct statement of the law, and that it was rendered incorrect by the modification, but since these instructions, both those given and refused, related to a fact which the jury found did not exist in the case, the refusal and the giving complained of were necessarily harmless, and for which appellant is not entitled to a reversal of the judgment. *Roush v. Roush*, 154 Ind. 562, 573; *Dickey v. Shirk*, 128 Ind. 278.

We find no error in the record. Judgment affirmed.

HAYMAKER, ADMINISTRATOR, v. SCHNECK ET AL.

[No. 20,085. Filed April 22, 1903.]

APPEAL AND ERROR.—*Vacation Appeal*.—*Parties*.—All of the defendants affected in any manner by the judgment appealed from must be made co-appellants in a vacation appeal. p. 446.

SAME.—*Vacation Appeal*.—*Parties*.—The mere fact that appellant, who was one of several lien holders made codefendants in an action to foreclose a mortgage, set up his lien by way of answer and cross-complaint constitutes no exception to the rule requiring all defendants to be made co-appellants in a vacation appeal. p. 447.

160	443
163	400
163	562
163	568

160	443
167	78
168	656

Haymaker v. Schneck.

From Clark Circuit Court; *J. K. Marsh*, Judge.

Suit by Louis Schneck against William T. Stricker and others. From a judgment for plaintiff, Isaac N. Haymaker, administrator of the estate of Phoebe S. Stricker, deceased, appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Appeal dismissed.*

W. H. Watson and *G. H. D. Gibson*, for appellant.
G. H. Voigt, for appellees.

JORDAN, J.—This action was instituted by appellee in the lower court to foreclose a mortgage lien upon certain real estate. The mortgage was executed by William T. Stricker and wife to Louis Schneck, to secure a promissory note of \$4,000. After the execution thereof, the mortgagor, together with his wife, conveyed the premises to Arnie C. Stricker, and the latter was the owner of the equity of redemption at the time of the commencement of this action. The plaintiff made said Arnie C. Stricker and wife defendants in this action. By the terms and stipulations of the deed executed by the mortgagor to the said Arnie C. Stricker, certain indebtedness of said William C. Stricker, held by Phoebe S. Stricker, appellant's decedent, and by Robert Hughes, Hallie K. Hughes, Pink Hughes, and Dick Giltner was made a lien or charge against the lands conveyed to said Arnie C. Stricker. All the last-named persons claiming to hold such liens against the premises were also made defendants to the foreclosure proceedings.

The purpose of the action, as disclosed by the complaint, was not to obtain a personal judgment on the mortgage note, but to foreclose the mortgage, and settle the question of liens. The complaint alleges that the liens held by the defendants under the provisions of the deed in question are each and all junior and inferior to the lien of the mortgage, and the plaintiff in his complaint demanded that each of said defendants be required to appear to the action and set up the liens which they claimed to hold against the

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premises. All of them appeared in the lower court, and Arnie C. Stricker, the owner of the equity of redemption, together with his wife, filed an answer in denial, and also alleged payment of the mortgage indebtedness. The defendants, Phoebe S. Stricker, appellant's decedent, then in life, together with Hallie K. Hughes, Pink Hughes, Robert E. Hughes, and Dick Giltner, filed separate answers, setting up their respective liens, alleging therein that such liens were superior in equity to the mortgage lien held by the plaintiff. Phoebe S. Stricker also set up her lien by way of a cross-complaint, and demanded affirmative relief. To her cross-complaint she made the plaintiff and all of her co-defendants, together with Arnie C. Stricker, administrator of William T. Stricker, defendants. Under her cross-complaint she sought to recover a judgment for \$3,500 against the administrator of William T. Stricker, and to have a vendor's lien declared in her favor against the mortgaged lands superior in equity to the mortgage lien of plaintiff.

The cause was put at issue upon the complaint, answer, cross-complaint, and replies therein filed; the disputed question in the case being mainly in respect to the priority of liens. On trial, the court found in favor of the plaintiff Schneck that there was due to him on the note secured by the mortgage in suit the sum of \$4,043.97, and that his lien was superior or paramount to any of the liens held by the defendants, and rendered a judgment of foreclosure in his favor and against all of said defendants, adjudging and ordering thereby that the mortgaged lands be sold by the sheriff, and that the proceeds arising out of the sale thereof be applied (1) to the payment of costs; (2) to the payment of the indebtedness secured by the plaintiff's mortgage; (3) to the payment of the lien of Phoebe S. Stricker, and that the remainder of said proceeds be paid to the clerk of the lower court for the benefit of the other defendants holding a lien against the premises. After the rendition of this judgment, Phoebe S. Stricker died, and

Haymaker v. Schneck.

appellant, her administrator, was substituted as a defendant in her place and stead. He has appealed in vacation from the judgment below, without making any of the codefendants of his decedent co-appellants with him in the appeal, but instead has made all of them the co-appellees of Schneck, the plaintiff below.

At the very threshold we are confronted with the motion of appellee Schneck to dismiss this appeal for want of jurisdiction in the court to hear and determine the merits thereof, for the reason that the codefendants of appellant's decedent have not been joined as appellants, but instead have been made appellees. The record discloses that not only appellant's decedent was affected and bound by the judgment rendered, but likewise all of her codefendants, for the fact is that all were adverse to the plaintiff Schneck, and he prevailed over all of them by being awarded a decree of foreclosure, and in having his lien declared to be superior to the liens held by any of the defendants. The judgment rendered in Schneck's favor affected and bound all of the defendants who denied his right of foreclosure of the mortgage, or who denied the priority or paramount character of his said lien. As between him and defendants who claimed to hold liens superior to the mortgage lien, plaintiff's rights under the judgment or the decree were declared to be superior and paramount to any of theirs, and the payment and satisfaction of any and all of the liens held by defendants against the mortgaged real estate was postponed until the payment in full of the plaintiff's lien. Under the circumstances, any one of the defendants in this action had the right to appeal in term time from this judgment, without joining as a co-appellant any of his codefendants, but the rule is otherwise, when an appeal is taken, as is this, in vacation, for in such cases all of the defendants against whom a judgment has been rendered, either in *rem* or *personam*, or who, in any manner, are bound or affected thereby, must be made co-appellants.

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Merely making them appellees in the appeal does not comply with the rule. All must be made appellants, otherwise the appeal can not be entertained for want of jurisdiction.

It is evident, under the circumstances, that appellant in this case has omitted to comply with this well settled rule of appellate procedure, and therefore this court is without power to hear and determine the appeal upon its merits. Consequently all we can do is to sustain the motion to dismiss, as we are absolutely without authority to waive the rule and assume jurisdiction in the case. The following decisions, among many others, fully affirm and support the rule which appellee herein demands shall be enforced: *McKee v. Root*, 153 Ind. 314, and cases there cited; *Gregory v. Smith*, 139 Ind. 48; *Abshire v. Williamson*, 149 Ind. 248; *Christ v. Wayne, etc., Loan Assn.*, 151 Ind. 245; *Michigan, etc., Ins. Co. v. Frankel*, 151 Ind. 534; *Owen v. Dresback*, 154 Ind. 392. The mere fact that appellant's decedent set up her lien by way of answer and cross-complaint certainly constitutes no exception to the rule which the law exacts in taking a vacation appeal.

It follows, for the reasons stated, that the motion to dismiss must be sustained. Appeal dismissed.

MANKIN v. PENNSYLVANIA COMPANY.

[No. 19,856. Filed April 23, 1908.]

APPEAL AND ERROR.—Change of Venue.—Superior Courts.—Jurisdiction of Case on Change of Venue.—Where a cause was sent to the superior court of an adjoining county on change of venue, and the plaintiff filed in such court an amended complaint and a reply to defendant's answer, without objection to the jurisdiction of the court, and proceeded to trial, it is too late for him to question the jurisdiction of the court for the first time on appeal. *pp. 449, 450.*

SAME.—Statute Repealed.—The act of 1878 (Acts 1878, p. 194) by which the original bill of exceptions containing the evidence could be embraced in the transcript without copying the same, was repealed by §1477 Burns 1901. *p. 451.*

180	447
168	442
180	447
168	448
180	447
164	409
180	447
168	533
180	447
170	76
170	648
180	447
171	241

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APPEAL.—Record.—Evidence.—Where the clerk took the part of the original bill of exceptions containing the evidence and incorporated it in the transcript without copying, and copied the remainder of the bill containing appellant's challenge to the array, the instructions to the jury, and the judge's certificate to the bill, the evidence is not properly in the record, under §§861, 862 Burns 1901, requiring all original papers, documents, or entries to be copied into the transcript, nor under §688a Burns 1901, which provides that the original bill containing the evidence may be embraced in the transcript instead of copying it therein. *p. 451.*

STATUTES.—Amendment.—Reference to Title.—Constitutional Law.—The act of 1891 (Acts 1891, p. 876) amending §359 of the act of 1881 (Acts 1881, p. 240) concerning struck juries, the same being §525 R. S. 1881, refers to the title of the act to be amended as "An act concerning trial by jury," giving the number of the section of the act sought to be amended, and the section number thereof in the revised statutes of 1881. The title to the act of which the section sought to be amended is a part is "An act concerning proceedings in civil cases." *Held*, that the act of 1891 is unconstitutional and void, under §21 of article 4 of the Constitution, which provides: "No act shall ever be revised or amended by mere reference to the title, but the act revised or section amended shall be set forth and published at full length."

SAME.—Amendment.—Reference to Title.—Constitutional Law.—Where the act or section to be amended is identified in the manner required by the Constitution, and it is not certain what act or section was amended, the court will resort to means other than the title to determine what act or section was amended; but if the act or section is not identified in the manner required by the Constitution, the court will not resort to such other means of identification, although the act intended would thereby be ascertained beyond question.

APPEAL AND ERROR.—Struck Jury.—Where under a demand for a struck jury it appears that the clerk of the court took forty of the names in the list made and filed by the jury commissioners from which a jury was struck, it must be held on appeal, nothing to the contrary being shown, that the clerk adopted said forty names as his own selection, under §525 R. S. 1881.

SAME.—Instructions.—When Evidence is Not in Record.—Where the evidence is not in the record, the instructions given by the court will not be held erroneous if correct under any evidence admissible under the issues in the cause.

From Porter Superior Court; *H. B. Tuthill*, Judge.

Action by Jesse Mankin against the Pennsylvania Company. From a judgment in favor of defendant,

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plaintiff appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

Peter Crumpacker, for appellant.

Allen Zollars, C. H. Worden and F. E. Zollars, for appellee.

MONKS, J.—Appellant brought this action in the Lake Superior Court to recover damages for personal injuries to himself, alleged to have been caused by appellee's passenger-train colliding with him on April 27, 1898. Before appellee filed any pleadings, the venue of said cause was changed to the Porter Superior Court, where appellant filed an amended complaint. Appellee filed an answer in two paragraphs, to the second paragraph of which appellant filed a reply. The cause was tried by a jury, and a general verdict returned in favor of appellee. Answers to interrogatories submitted by the court at the request of the parties were returned with the general verdict. Over appellant's motion for a new trial, judgment was rendered in favor of appellee upon the general verdict.

Appellant has assigned two errors: (1) "That the Porter Superior Court erred in proceeding in said cause, for it had no jurisdiction;" (2) the court erred in overruling appellant's motion for a new trial.

At the time the change of venue was taken, the statute provided that the cause should be sent to the circuit court of the adjoining county. After the papers and transcript in said cause had been filed in the office of the clerk of the Porter Superior Court, and said cause docketed therein, appellant appeared in open court and filed an amended complaint, and afterwards filed a reply to appellee's answer to said complaint. Afterwards the cause was tried by a jury, and a verdict returned. Appellant filed a motion for a new trial, which was overruled, and final judgment was rendered against him. Appellant did not raise any question in the court below as to the jurisdiction of said court.

The Porter Superior Court had general jurisdiction over the class of cases to which the one before us belongs. After appellant appeared in that court, without objection to the jurisdiction thereof, and took the steps above mentioned, as the record shows, it was too late for him to question its jurisdiction of this cause. Appellant was plaintiff, and was demanding in that court, which had general jurisdiction over the subject-matter, a judgment against appellee. He can not now claim that said court had no authority to act. *Cox v. Pruitt*, 25 Ind. 90, 93, 94; *Garner v. Board*, 27 Ind. 323, 324; *Tholke v. State, ex rel.*, 50 Ind. 355, 356; *Street v. Chapman*, 29 Ind. 142, 151, 152; *Center Tp. v. Board, etc.*, 110 Ind. 579, 582, 583.

Appellee insists that the part of the record which purports to be a bill of exceptions containing the evidence, proceedings on appellant's challenge to the array, and the instructions, is not in the record, and that for this reason no question presented by the motion for a new trial can be determined. What purports to be a bill of exceptions commences on page 70, and ends on page 522 of the transcript. The jury returned a verdict on May 27, 1899, the last day of the May term of said court, and appellant filed his motion for a new trial on the first day of the next term of said court. Said motion was overruled by the court on May 27, 1900, and ninety days given appellant in which to file a bill of exceptions. The evidence was taken down by an official reporter, and the longhand manuscript of the evidence was filed in the clerk's office before it was incorporated in the bill of exceptions. After the same was incorporated in the bill of exceptions, said bill, on January 9, 1901, was signed by the judge and filed in the clerk's office on January 10, 1901. It appears from the record that the clerk has taken pages 70 to 485 inclusive, of the original bill of exceptions, and embraced the same in the transcript, and immediately thereafter has copied into the transcript the remainder of the bill of exceptions, being pages 486 to

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522, inclusive. In other words, said original bill of exceptions has been taken or torn apart, and that part thereof containing the evidence and the beginning of the bill has, without copying, been embraced in the transcript as pages 70 to 485 inclusive, and the remainder of said original bill, containing the proceedings on appellant's challenge to the array, and the instructions, and the judge's certificate to the bill, has been copied into the transcript as pages 486 to 522 inclusive.

Appellant insists that the bill of exceptions is properly in the record in this court, under the act of 1873 (Acts 1873, p. 194), and that the evidence and other matter contained therein must be considered by this court. An examination of the decisions of this court will show that said bill of exceptions is not a part of the record under said act. It is clear, however, that said act of 1873 was repealed by §1447 Burns 1901, §8, Acts 1899, p. 384, which took effect March 3, 1899, several months before the trial of this cause. We need not, therefore, give said act of 1873 any further consideration.

Under the code of civil procedure no original paper, document, or entry in a cause can be incorporated in the transcript filed on appeal in this court, but all papers, documents, and entries must be copied into the transcript, and if any such original paper, document, or entry is incorporated in the transcript it will be disregarded. §§661; 662 Burns 1901, §§649, 650 R. S. 1881 and Horner 1901; *Holt v. Rockhill*, 143 Ind. 530, 532, 533; *Leach v. Mattix*, 149 Ind. 146, 148, and cases cited. The only exception to this rule, since the repeal of said act of 1873 (Acts 1873, p. 194) is that created by §638a Burns 1901 (Acts 1897, p. 244), under which an original bill containing the evidence may be embraced in the transcript, instead of copying it therein. All other laws on this subject have been either repealed or held unconstitutional. *Smith v. State*, 145 Ind. 176, 182, 183; *Beatty v. Miller*, 146 Ind. 231; *Adams v.*

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State, 156 Ind. 596, 597-603. Nothing, however, but the evidence can be brought up by the original bill. If it contains instructions or other matters, they will be disregarded. *Adams v. State*, *supra*, and cases cited; *Maynard v. Waidlich*, 156 Ind. 562, 566.

Said original bill of exceptions is not embraced in the transcript as required by the act of 1897, *supra*, and is not, therefore, in the record under that act. Nor is the bill copied into the transcript as required by §§661, 662, *supra*, and the same is not, therefore, in the record under said sections.

As neither said act of 1897, *supra*, nor said §§661, 662, *supra*, have been complied with, said bill of exceptions can not be considered.

But if the court considered that part of the bill which is copied into the transcript, and which includes a copy of the judge's certificate showing when the same was presented to, and signed by him, it would not change the result. Said part of the bill shows that appellee filed in the office of the clerk of the Porter Superior Court a written demand for a struck jury to try said cause; that said clerk gave written notice, according to law, of said demand to appellant and appellee that the date fixed for the striking of said jury was May 11, 1899. The jury commissioners were also notified of said demand and date, and on May 8, 1899, said jury commissioners handed to the clerk the names of fifty persons from whom to strike said jury; that all of the persons named in said list were residents of Center township, in Porter county, and all but two were residents of the city of Valparaiso, in said township. On the day fixed to strike the jury said jury commissioners were not present, and said appellee was present by its attorneys, and, appellant not appearing at any time either in person or by attorney, appellee, by its attorneys, and the clerk of said court proceeded to strike from a list of forty names taken by the clerk from such list of fifty names until the list

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was reduced to sixteen, whereupon the clerk issued process to the sheriff commanding him to summon said sixteen persons as struck jurors. None of the names of said list of fifty names was selected by said jury commissioners and deposited in the jury-box, nor were such names, or any of them, drawn from the jury-box. After the jury had been sworn on their *voir dire*, and before they were sworn to try the cause, appellant challenged the array, one of the grounds of challenge being that the provisions of §534 Burns 1901, Acts 1891, p. 376, had not been complied with in the selection of the names and striking of the jury.

It is contended by counsel for appellee that the act of 1891, *supra*, is unconstitutional and void, under §21 of article 4 of the Constitution. Section 21 of said article provides that "No act shall ever be revised or amended by mere reference to the title; but the act revised or section amended shall be set forth and published at full length." It has been uniformly held by this court that two things were required by said section of the Constitution in the amendment of a section of an act: (1) The title of the act to be amended should be referred to by setting the same out in the title to the amendatory act; and (2) the section as amended should be set forth and published at full length. *Citizens St. R. Co. v. Haugh*, 142 Ind. 254, 256; *Lingquist v. State*, 153 Ind. 542-544, and cases cited; *O'Mara v. Wabash R. Co.*, 150 Ind. 648, and cases cited. The title to the act of 1891, in controversy, reads as follows: "An act to amend §359 of an act concerning trial by jury, in force since September 19, 1881, the same being §525 of the revised statutes of 1881." The reference in the title to §359, under the cases cited above, is not sufficient. Said section may be found in an act entitled, "An act concerning proceedings in civil cases," Acts 1881, pp. 240, 307, §525 R. S. 1881.

It will be observed that the amendatory act of 1891

(Acts 1891, p. 376) does not refer to the title of the act to be amended by setting it out, as required by said §21 of article 4 of the Constitution, but refers to the act to be amended as, "An act concerning trial by jury," which is not the title of the act in which said §359, *supra*, may be found. When the act or section to be amended is identified in the manner required by the Constitution, and it is not certain what act or section was amended, the court will resort to means other than the title to determine what act or section was amended. But if the act or section is not identified in the manner required by the Constitution, the court will not resort to such other means of identification, although the act intended would thereby be ascertained beyond question. *Lingquist v. State*, 153 Ind. 542, 544; *Citizens St. R. Co. v. Haugh*, 142 Ind. 254, 256, 257, and cases cited. It follows that as the title of said act of 1891, *supra*, fails to identify the section to be amended by setting the same out in the title thereof, as required by §21 of article 4 of the Constitution, the same is unconstitutional and void, and that §359, Acts 1881, pp. 240, 307, §525 R. S. 1881, was in force when said jury was struck. The fact that said unconstitutional act of 1891 was not observed in the striking of said jury, therefore, furnishes appellant no ground for complaint.

The clerk of the court below took forty of the names in the list made and filed by the jury commissioners in the clerk's office, and from them the jury was struck. It must be held, nothing to the contrary being shown, that the clerk adopted said forty names as his own selection under §525, *supra*. The court heard the evidence on the challenge to the array and found against appellant. We think this finding of the court below was clearly sustained by the evidence given on that issue.

Complaint is made of certain instructions given to the jury. As the evidence is not in the record, none of the instructions will be held erroneous if correct under any

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evidence admissible under the issues in the cause. *Rapp v. Kester*, 125 Ind. 79, 82, and cases cited; *Chestnut v. Southern Ind. R. Co.*, 157 Ind. 509, 515, and cases cited. Considering the instructions as a whole, and disregarding mere verbal inaccuracies, as we are required to do (*Shields v. State*, 149 Ind. 395, 406, and cases cited), we can not say that said instructions are not correct under any evidence admissible under the issues.

Judgment affirmed.

Gillett, J., concurs in the result.

ZUELLY ET AL. v. CASPER ET AL.

[No. 19,782. Filed April 24, 1903.]

160	455
160	491
180	455
163	210

COUNTIES.—Officers.—Unlawful Allowances.—Recovery.—Parties.—Suit by Taxpayer.—Suit may be maintained by resident taxpayers of the county against the county auditor for the recovery, for the benefit of the county, of money wrongfully allowed by the board of commissioners and unlawfully paid to the county auditor in excess of the salary, fees, and compensation to which he was entitled under the statute, where the board of commissioners was requested by plaintiffs to bring the action, and refused to do so.

From Perry Circuit Court; *E. M. Swan*, Judge.

Suit by Adolph Zuelly and others against Martin F. Casper and others. From a judgment for defendants on demurrer to complaint, plaintiffs appeal. Transferred from Appellate Court, under §1837u Burns 1901. *Reversed*.

S. H. Esarey, for appellants.

J. L. Suddarth, W. T. Zenor, M. D. Casper and Philip Zoercher, for appellees.

DOWLING, J.—The appellants, Adolph Zuelly, Henry H. Bielefeld, and Frederick B. Wichser, describing themselves as residents and taxpayers of the county of Perry, in the State of Indiana, brought this suit against the appellee Casper and the board of commissioners of said county

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to recover, for the use of the county, some \$3,985 charged to have been wrongfully allowed by the said board and unlawfully paid to the appellee Casper, who was the auditor of said county, in excess of the salary, fees, and compensation to which he was entitled under the statute.

The rulings of the court sustaining demurrers to the complaint for the insufficiency of the facts stated, for want of capacity of the plaintiffs to sue, and for a defect of parties plaintiff, are the errors assigned.

The allegations of the capacity in which the plaintiffs sue, and their interest in the subject-matter of the action are followed by the averments that Casper was elected auditor of Perry county at the general election held in November, 1890, and that he duly qualified and entered upon and discharged the duties of the office for the term of four years from and after December 1, 1890; that at the general election held in November, 1894, he was reelected to said office for the term of four years from December 1, 1894, and that he was duly qualified and entered upon and discharged the duties of said office for said term; that during each of said terms the said Casper received the full amount of the fees and salaries allowed him by law as such auditor; that, under color of his said office of auditor, the appellee Casper, in addition to his lawful fees and salary, taxed and charged against said county divers illegal fees and claims which are itemized and particularly set out, amounting in the aggregate to \$3,985; that the said fees and claims were allowed by said board of commissioners, and that said Casper, as such auditor, was by said board authorized to draw his warrants upon the county treasurer for the sum so allowed; that said sums were drawn by and paid to said Casper, who still retains the same, although said moneys were demanded from him by the said board; that more than thirty days before the commencement of this suit the appellants requested said board of commissioners to bring an action against the said Casper for the recovery of

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the moneys so received by him, but that said board refused, and still refuses, to do so. The complaint further avers that the suit is brought for the benefit of the county of Perry, and that the board of commissioners of said county is made a defendant to answer as to its interest in said cause.

The objection to the complaint is thus stated in the brief of counsel for appellees: "The appellees insist that under the law of the State of Indiana, and under the facts as disclosed by the pleading in this case, the board of commissioners of Perry county, Indiana, alone, could bring this action against Martin F. Casper as auditor of said county, and that the appellants have no legal right to bring the suit as it was brought in this case." It is further contended in argument that the appellants can not maintain the suit because it does not appear that they have suffered a special injury different from that sustained by the general public in the violation of a duty owing to them as individuals.

The complaint charges and the demurrer admits that the appellee Casper, as auditor, wrongfully received a very large amount of the public revenues of the county, and that he refused to repay this money to the county, to which it rightfully belonged. It also appears, and is admitted by the demurrer, that the board of commissioners of the county refuses to bring suit to recover the moneys so wrongfully withheld. If the appellees are correct, the unfortunate county, by reason of the dishonesty of its officers, is utterly helpless, and nothing can be done by it or by its taxpayers to redress the wrongs to which for eight years it was systematically subjected. If this is the law, the situation is certainly one to be deplored.

Each of the counties of this State is an involuntary subdivision of the State, and a corporation for governmental purposes. Its corporate name is the Board of Commissioners of the County of ———, and such board is the legal representative of the county, having the general management and control of its property and affairs. In most

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cases, where money is due or owing to the county, it is the duty of the board of commissioners to compel its payment, by suit if necessary, and to take all proper steps to protect the rights and interests of the county. But the inhabitants, not the board, constitute the county; and if their interests are neglected or betrayed by the officers charged with the duty of protecting them, all or any of the inhabitants and taxpayers who are injuriously affected by the malfeasance or nonfeasance of the board may in many cases bring an action to prevent a threatened wrong, or to obtain redress for an injury already inflicted upon the county. Nothing is more certain than that the board of commissioners can make no disposition of the public funds except such as is expressly authorized by law. It is equally true that a public officer can receive only such fees, salary, or compensation as is expressly given him by statute. The board can no more make donations of the public revenues to a county officer than it can bestow such favors on private individuals. Taxation is the source of revenue, and the moneys collected by that means can not be applied to any purpose not authorized by law.

The objection urged against the right of a taxpayer to maintain a suit on behalf of the public has been presented in many cases in this court in which the relief sought was an injunction against the unauthorized application of the revenues of the county. Such right has uniformly been upheld. In *Harney v. Indianapolis, etc., R. Co.*, 32 Ind. 244, 247, the court, by Frazer, C. J., said: "But it is contended that a taxpayer has no such interest in the funds belonging to the county treasury as will enable him to maintain a suit to prevent unlawful appropriations thereof. We can not regard this question as open to further discussion in this court. It has been a common remedy in this State, and has been sanctioned by repeated judgments here. *Lafayette v. Cox*, 5 Ind. 38; *Oliver v. Keightley*, 24 Ind. 514. It has been sanctioned elsewhere. *New London v.*

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Brainard, 22 Conn. 552. It is sanctioned by established principles acted upon and recognized everywhere. The citizen may not be able to protect himself in any other way. If this is not his remedy, he has none. The money drawn from him by taxation may be squandered by unlawful donations to forward all manner of visionary schemes; other contributions may be wrung from him from year to year and wasted in the same way, in defiance of laws carefully framed for his protection, and he would nevertheless be helpless. A more proper case for injunction can not be well conceived than that in which a taxpayer seeks to protect from lawless waste a public fund, which, when dissipated thus, the law will with strong hand compel him to replenish. See *Gifford v. New Jersey R. Co.*, 2 Stock. 171." The following authorities are to the same effect: *Board, etc., v. Markle*, 46 Ind. 96; *Deweese v. Hutton*, 144 Ind. 114; *Town of Winamac v. Huddleston*, 132 Ind. 217; *Alexander v. Johnson*, 144 Ind. 82; *Nill v. Jenkinson*, 15 Ind. 425; *Dillon*, Mun. Corp. (4th ed.), §§917, 922. So to, it has been held by this court that a citizen and taxpayer has such an interest in the subject as entitles him to examine the records and files of the county auditor's office, under reasonable regulations, and that such right may be enforced by mandamus. *State, ex rel., v. King*, 154 Ind. 621.

The reasons given by the court in support of the right of a taxpayer to maintain an action to enjoin an unlawful disposition of public funds apply with equal force where the wrong has been accomplished, the fund dissipated, and the public officers, whose duty it is to sue for and recover the money, obstinately or corruptly refuse to act. In the case of private corporations, it has often been decided that suit may be brought by a stockholder on behalf of the corporation, against the directors and others for frauds, wrongs, and breaches of trust, and for the recovery from them of money of which the corporation has been de-

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frauded; the latter being joined as a defendant. *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401; *Davenport v. Dows*, 18 Wall. 626, 21 L. Ed. 938; *Hawes v. Oakland*, 104 U. S. 450, 460, 26 L. Ed. 827; *Porter v. Sabin*, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815; *Beach v. Cooper*, 72 Cal. 99, 13 Pac. 161; *Streight v. Junk*, 16 U. S. App. (6th Cir.) 608, 8 C. C. A. 137, 59 Fed. 321; Pomeroy, Eq. Jurisp. (2d ed.), 1095; Thompson, Corporations, §4479; Beach, Priv. Corp., 256.

The legal principle which, under special circumstances, and subject to somewhat narrow restrictions, permits a stockholder to sue for the redress of wrongs or frauds upon the corporation, may, without violence, be extended to the taxpayers of public corporations, where the wrong is apparent, the equity clear, and the officers charged with the duty of protecting the interests of the taxpayers refuse to act. It is also to be observed that the statutes of this State expressly recognize the right of a taxpayer to interpose by appeal for the purpose of defeating allowances made by the board of commissioners without authority of law. §§7858, 7859 Burns 1901, §§5771, 5772 R. S. 1881 and Horner 1901; *Fordyce v. Board, etc.*, 28 Ind. 454; *State, ex rel., v. Benson*, 70 Ind. 481; *Gemmill v. Arthur*, 125 Ind. 258; *Myers v. Gibson*, 147 Ind. 452.

And it is provided in the code of civil procedure that, when the question is one of a common or general interest of many persons, one or more may sue or defend for the benefit of the whole. §270 Burns 1901, §269 R. S. 1881 and Horner 1901; *Tate v. Ohio, etc., R. Co.*, 10 Ind. 174; Pomeroy, Remedies & Remedial Rights (2d ed.), §§388-390.

The precise question before us has been decided by the supreme court of Wisconsin. In *Land, etc., Co. v. McIntyre*, 100 Wis. 245, 75 N. W. 964, 69 Am. St. 915, the action was brought to charge the defendant as trustee for Vilas county for moneys claimed to have been corruptly

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drawn by him from the treasury of the county. The complainants showed that they were taxpayers of the county; that they had applied to the board of supervisors, and demanded that an action be brought by the board to recover the moneys afterwards sued for by the complainants; that the board refused to take any action; and that thereupon suit was instituted in behalf of the complainants and other taxpayers. A demurrer to the complaint was overruled, and the defendant appealed. Objection was made in that case, as in the case at bar, that the plaintiffs could not maintain the action because their interest was indirect, and could be enforced only in the name of the board of supervisors. In disposing of this objection, in the course of a carefully considered opinion, the court, by Marshall, J., said: "The general rule is that where a cause of action exists in favor of a corporation, and its governing body refuses to enforce it, any member thereof may do so by suing in equity in behalf of himself and all others similarly situated. *Thompson, Corporations*, §4479; *Doud v. Wisconsin, etc., R. Co.*, 65 Wis. 108; *Hinz v. Van Dusen*, 95 Wis. 503. That applies to public as well as private corporations. *Willard v. Comstock*, 58 Wis. 565; *Frederick v. Douglas Co.*, 96 Wis. 411; *Quaw v. Paff*, 98 Wis. 586; *Dillon, Mun. Corp.*, §915. And by force of a statute of this state, a creditor of a corporation has sufficient interest therein to entitle him to maintain the action. *South Bend, etc., Co. v. George C. Cribb Co.*, 97 Wis. 230; *Gores v. Day*, 99 Wis. 276. The purpose of the remedy in such cases is not to interfere with the exercise of legal discretion on the part of those charged with the primary duty of enforcing corporate rights, but to furnish relief where there is an unjustifiable neglect or refusal to exercise such discretion. Neither is the remedy confined to the one which the corporation may invoke, whether equitable or legal. The remedy afforded to a member of a corporation is necessarily in equity, for he has no direct interest to be protected by a

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personal action. He must proceed in equity or not at all, joining the corporation as a party in the capacity of trustee for all its members. * * * So, the rule is firmly established that where a cause of action exists in favor of a corporation, whatever be its proper remedy, if its governing body refuses to proceed, justice can not thereby be defeated, for those upon whom the injury indirectly falls may obtain redress in equity. It certainly would be a strange situation if unfaithful officials could plunder a county in the manner alleged in the complaint and be free from danger of being compelled to return their ill-gotten gains, or make good the injury caused by their corrupt conduct, because they had retired from office and the corporation, through its proper officers, unjustly refused to prosecute them. The intelligence and wisdom of the lawmakers, and the boasted power of courts of equity to lay hold of situations where legal remedies stop, and prevent a failure of justice flowing from defective legal remedies, are not rightly subject to such a criticism. As well said by Chief Justice Orton in *Willard v. Comstock*, 58 Wis. 565, in substance: If, for conduct such as detailed in the complaint, there is no remedy, and there is none unless this be proper, the taxpayers are at the mercy of dishonest officials and must stand by and see the public treasury plundered, bound helpless by technical rules of law. The idea is simply preposterous, and that is all that need be said about it. No such situation exists, as is sufficiently shown by what has preceded. The powers of courts of equity are broad and absolute enough to fit all situations where justice requires a remedy. While guided by precedents, equity is not bound by them, but may meet new situations as they arise, so that in the race between it and the ingenuity of unfaithful officials, the former will generally prevail, unless defeated by utter insolvency of such officials."

Again, in *Webster v. Douglas County*, 102 Wis. 181, 77 N. W. 885, 72 Am. St. 870, the doctrine stated in

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Land, etc., Co. v. McIntyre, 100 Wis. 245, 75 N. W. 964, 69 Am. St. 915, was reaffirmed in these words: "It is well settled in this state that a taxpayer may maintain an action in equity, on behalf of himself and all other taxpayers, to restrain public officers from paying out the public money for illegal purposes. and may also, under the proper circumstances, compel public officers, and even third persons, to repay into the public treasury money already paid out illegally. These propositions do not require further discussion."

The case brought here by this record is in the nature of a suit in equity to charge the appellee Casper for moneys belonging to the county wrongfully obtained by him, and now unlawfully withheld. The complaint shows (although with less fulness and particularity than could be wished) that the board of commissioners was requested by the appellants to bring an action for the recovery of the said moneys, and that they refused to do so. Under these circumstances, we are of the opinion that the appellants, as taxpayers, had such an interest in the public funds wrongfully withheld and appropriated by the appellee Casper as authorized them to institute an action in their own names for the benefit of themselves and all others having a common interest with them in the restitution of the said revenues; the board of commissioners being joined as a defendant.

No question is made by the appellees as to the illegality of the allowances made to Casper which are sought to be recovered in this suit. It is perfectly clear that many of them were wholly unauthorized, and it is not necessary for us to consider them in detail.

The complaint was sufficient, and the court erred in sustaining the demurrers to it. Judgment reversed, with directions to overrule the demurrers to the complaint, and for further proceedings in conformity to this opinion.

Jordan, J., did not participate in this decision.

SEIFERT v. THE STATE.

[No. 19,939. Filed April 24, 1903.]

CRIMINAL LAW.—Abortion.—Principal.—Absence of Principal.—One who procures an instrument for a woman, which he advises and directs her to use upon herself to produce a criminal abortion, may be convicted as principal, where the woman, pursuant to such advice and direction, uses the instrument for such purpose, though in the absence of the former, thereby causing her to miscarry and die. *pp. 465-472.*

SAME.—Abortion.—Dying Declarations.—Evidence.—Dying declarations of the woman, in a prosecution for criminal abortion resulting in death, to the effect that when she told defendant that she was pregnant by him, he promised to relieve her, and brought her the instrument with which she procured the abortion and told her to use it, were admissible as relating to the circumstances of the death. *pp. 467-470.*

SAME.—Abortion —Corpus Delicti.—Evidence.—In a prosecution for producing criminal abortion resulting in the death of the woman, evidence showing the abortion, and the death as a result thereof, that there were two openings from the uterus into the abdominal cavity, that there was a delay in calling a physician, and statements of deceased of her purpose to get rid of the child, was sufficient to establish the *corpus delicti*. *pp. 469, 470.*

EVIDENCE.—Privileged Communications.—Physician and Patient.—Witnesses.—Criminal Law.—Abortion.—Testimony of a physician, who was called to treat deceased, that after she had consulted him, and he had advised her, she then stated to him that she desired him to perform a criminal abortion upon her person, that he refused to do so, and that she then said that, if he would not aid her, she would use a catheter to produce it herself; that defendant was the father of her child, and had tried to persuade her not to commit an abortion; that he wanted to marry her, but that she was not so situated that she could marry him at the time, was admissible in contradiction of the dying declarations of the deceased that she used a catheter, prior to this conversation, at the direction of defendant, and furnished by him, such communication not being privileged within the meaning of the provisions of §506 Burns 1901, that physicians shall not be competent witnesses as to matters communicated to them as such by patients in the course of their professional business. *pp. 470, 471.*

SAME.—Privileged Communications.—Physician and Patient.—Witnesses.—Criminal Law.—A statement made by a patient to a physician after the physician had treated her and went to collect his bill,

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that she was not able to pay it, and, upon being asked if defendant would pay it, said he would not, that he had nothing to do with producing her condition and did not advise her to commit an abortion, was not a privileged communication within the meaning of §506 Burns 1901, and was improperly excluded in a prosecution against defendant for producing an abortion on such woman resulting in her death. *p. 473.*

EVIDENCE.—*Dying Declarations.*—*Impeachment.*—*Abortion.*—Where in a prosecution for producing an abortion resulting in the death of the woman, dying declarations of the woman in which she admitted using a catheter upon her person to produce the abortion were admitted, the court erred in refusing an instruction to the effect that in determining what weight should be given to the dying declarations the jury might consider the fact that according to her own admission therein the declarant had used the catheter upon her person to produce an abortion. *p. 474.*

From Wayne Circuit Court; *J. W. Headington*, Special Judge.

Joseph Seifert was convicted of producing a criminal abortion resulting in the death of the woman, and appeals. *Reversed.*

H. U. Johnson and *T. J. Study*, for appellant.

W. L. Taylor, Attorney-General, *C. C. Hadley* and *Merrill Moores*, for State.

GILLET, J.—Appellant was charged with producing a criminal abortion, resulting in the death of the woman. From a judgment of conviction he appeals to this court.

The first question presented is whether a person who procures an instrument for a woman, which he advises and directs her to use upon herself to produce a criminal abortion, can be convicted as a principal, where the woman, pursuant to such advice and direction, uses such instrument for such purpose, in the absence of the former, thereby causing her to miscarry and die.

Assuming, without deciding, that it was not the purpose of the legislature, in the enactment of §1857 Burns 1901, entirely to blot out the distinction between principals and accessories, we think that it may still be affirmed that ap-

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pellant was properly charged as a principal. While the principal in the commission of a felony must be actually or constructively present at the time of its commission (1 Bishop, Crim. Law (8th ed.), §648; McClain, Crim. Law, §204), yet a person who causes such a crime to be committed through an innocent agent is deemed constructively present. McClain, Crim. Law, §§187, 207; 1 Bishop Crim. Law (8th ed.), §§648, 651; *Commonwealth v. Hill*, 11 Mass. 136; *Gregory v. State*, 26 Ohio St. 510, 20 Am. Rep. 774. This fiction of the constructive presence of the real instigator and promoter of the crime is indulged in a case where an innocent agent commits the act, because there would otherwise be no principal. This being the reason for the doctrine, it is evident that the test as to whether the former is a principal or an accessory does not depend upon whether the agent is morally innocent, but upon whether he is criminally responsible for the particular crime charged. As said by Mr. Bishop: "Since there must always be a principal, one is such who does the criminal thing through an innocent agent while personally absent. For example, when a dose of poison, or an animate object like a human being, with or without general accountability, but not criminal in the particular instance, inflicts death or other injury in the absence of him whose will set the force in motion, there being no one but the latter whom the law can punish, it of necessity fixes upon him as the doer." 1 Bishop, Crim. Law (8th ed.), §651.

It is evident in view of the provisions of §1997 Burns 1901, that the penalties of the next preceding section are denounced, not primarily, if at all, against the woman, but against the third person. *State v. Murphy*, 27 N. J. L. 112; *State v. Hyer*, 39 N. J. L. 598; *Moore v. State*, 37 Tex. Cr. 552, 40 S. W. 287; McClain, Crim. Law, §204. If she could be liable at all under the last mentioned section, it could only be as an accomplice to such third person, as held in *State v. McCoy*, 52 Ohio St. 157, 39 N. E. 316,

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and that would require that such third person should be moved up to the degree of principal. Moreover, if the act, done with the criminal purpose, eventuates in the death of the woman, that is a substantive offense (*Montgomery v. State*, 80 Ind. 338, 41 Am. Rep. 815), and as it is not consummate until her death, it is evident that she can not become the principal, and that for want of some principal whom the third person may be regarded as an accessory to, the latter must be treated as a principal, or else we have the solecism of a felony without a principal. It is argued by appellant's counsel that there was no principal, and therefore no crime. The maxim, *qui facit per alium, facit per se*, is of extensive application in the criminal law, and, if the State's theory of the facts be assumed, it may be stated that appellant was clearly within the operation of the maxim as a working rule.

Complaint is made of the rulings of the trial court in admitting the dying declarations of the woman, taken in interrogatory form. The questions and answers complained of are as follows: "(3) Were you pregnant with a bastard child recently? A. Yes." "(10) When did you first tell Joe Seifert that you were pregnant by him? A. I don't know when it was." "(12) When you told Joe Seifert that you were pregnant by him, what did he say, if anything? A. He didn't say much about it; only he said he would help me get away with it, and I said all right. (13) What did he do, if anything, toward helping you to get away with it? A. He got a catheter and brought it to me. (14) What did he say, if anything, when he brought you the catheter? A. He didn't say anything. (15) Did you know what it was when he brought it to you? A. Yes, I'd seen them before. (16) Did you know how to use it? A. Yes." "(19) When did you use it the last time? A. About four months ago. (20) Where were you when you used it? A. At my home on Washington avenue, number 28." "(22) What, if anything, had you said to him and

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he to you about your condition before you used it the last time? A. I told him, 'I am in trouble;' and he said, 'You will have to get out of it.' (23) When Mr. Seifert gave you the last catheter did you use the same? A. Yes. (24) Did he tell you to use it? A. Yes, he told me to use it."

It is not disputed that dying declarations are competent in prosecutions for causing death by criminal abortions, the element of death being a substantive part of the charge. *Montgomery v. State*, 80 Ind. 338, 41 Am. Rep. 815. Such declarations are admitted upon the ground of necessity. The necessity, however, does not depend upon the stress of the particular case, but upon the fact that ordinarily there is no other equally satisfactory proof of the circumstances connected with the fatal injury. Dying declarations being an exception to the rule excluding hearsay testimony, the above consideration marks, in a general way, the extent of the exception. "The declarant," says the supreme court of Alabama, "does not become a general witness. He can only speak of the transaction which causes the death, and such accompanying acts, statements and conduct as shed light on it; the *res gestae* in a strict sense." *Sullivan v. State*, 102 Ala. 135, 141, 15 South. 264, 48 Am. St. 22. Accordingly, it has quite frequently been held that testimony of prior difficulties and prior threats is incompetent. *Binns v. State*, 46 Ind. 311; *Jones v. State*, 71 Ind. 66; *Reynolds v. State*, 68 Ala. 502; *Warren v. State*, 9 Tex. App. 619, 35 Am. Rep. 745; *State v. Perigo*, 80 Iowa 37, 45 N. W. 399. There is much force in the suggestion that, "As soon as the limit fixed by absolute necessity is passed, the principle upon which the exception is based being exceeded, there is no longer any limit whatever, and dying declarations become admissible, not merely to prove the act of killing, but to make every homicide murder by proof of some old grudge." *State v. Shelton*, 47 N. C. 360, 364, 64 Am. Dec. 587. Prior difficulties and prior threats may not,

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however, have had any part in the killing, but the dying declarations complained of by appellant in this case, for the most part, lie at the basis of the controversy. The theory of the State is that the appellant furnished the deceased with a catheter, and incited her to use it to produce a criminal abortion. As a person occupying practically the position of an accessory before the fact, his criminal conduct, if he is guilty as charged, consisted in the furnishing of the instrument and in the inciting of the deceased to perform an abortion on herself. We can not consent to the view that the dying declarations must be confined to the time when deceased committed the act that resulted in an abortion, for that would leave appellant out of view entirely. The furnishing of the instrument and the inciting of the deceased to commit an abortion are as central and vital elements in the case as was the act of the deceased. In holding that declarations concerning all of these elements are proper we think that we are fully within the rule that the circumstances of the death must be the subject of the dying declaration.

We shall now refer to the questions and answers complained of more particularly. We need not rule on the motion to strike out questions three and ten and their respective answers, as the case will have to be reversed for other reasons, and appellant is already too far committed to the facts that said answers tend to establish to enable him to controvert them hereafter. It is the opinion of the writer that questions thirteen, fifteen, and sixteen, and the respective answers thereto, should have been suppressed, particularly question thirteen and answer; but it is the opinion of the other members of the court that, considering the declarations as a whole, there was no reversible error in permitting all of the questions and answers to be read that the trial court submitted to the jury.

We do not deem it necessary to decide whether the *corpus delicti* can be proved by dying declarations. The

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abortion and the death as a result thereof were very clearly proved, and the only remaining question, in so far as the *corpus delicti* was concerned, was whether natural causes brought about the abortion or whether a criminal operation occasioned it. In view of the evidence of the two openings from the uterus into the abdominal cavity, the delay in calling a physician, and the statement of the deceased, made to the appellant just before her sickness, of her purpose to get rid of the child (see *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706; *Commonwealth v. Trefethen*, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235; *State v. Howard*, 32 Vt. 380; *State v. Dickinson*, 41 Wis. 299; *Boyd v. State*, 14 Lea 161; *Blackburn v. State*, 23 Ohio St. 146), we have concluded that the *corpus delicti* was so far proved as not to present any question of law to this court. See, upon the subject of the *corpus delicti* in cases of this character, *Campbell v. People*, 159 Ill. 9, 42 N. E. 123, 50 Am. St. 134; *State v. Williams*, 52 N. C. 446, 78 Am. Dec. 248 and note. And see, also, *Stocking v. State*, 7 Ind. 326.

It has been said that dying declarations are admitted to bring the manslayer to justice. It may be that there ought to be evidence reasonably warranting the inference of an unlawful homicide before dying declarations are admitted, but, such prior evidence existing, we perceive no reason why the declarations, when admitted, should not have a suppletory effect.

The statements of the deceased in her dying declarations were open to contradiction. *People v. Lawrence*, 21 Cal. 368; *Battle v. State*, 74 Ga. 101; *Felder v. State*, 23 Tex. App. 477, 5 S. W. 145, 59 Am. Rep. 777. Upon the trial of the case appellant sought to contradict the portions of said declarations that incriminated him by the testimony of a physician as to statements that the deceased had made to him. The physician, when called as a witness, testified that he had been the physician of the deceased for some

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time, and that she called upon him for the purpose of receiving treatment about three months before her death. Upon the propounding of the next question, relative to said visit, the State objected, on the ground that the communication was privileged. In response to appropriate questions, the appellant then sought to show by said witness that after deceased had so consulted him, and after he had so advised her, she then stated to him, in an entirely separate and distinct conversation, that she desired him to perform a criminal abortion upon her person; that he refused to do so, and that she then said that if he would not aid her, she would use a catheter to produce it herself; that Joe Seifert was the father of her child, and had tried to persuade her not to commit an abortion upon her person; that he wanted to marry her, but that she was not so situated that she could marry him at that time. It is provided by statute in this State that "the following persons shall not be competent witnesses: * * * (4) Physicians, as to matter communicated to them as such, by patients, in the course of their professional business, or advice given in such cases." §505 Burns 1901. And see §1865, *supra*. Notwithstanding the broad language of the enactment, we think that a request to a physician to commit a crime is not privileged. *Hauk v. State*, 148 Ind. 238; *Coveney v. Tannahill*, 1 Hill 33, 37 Am. Dec. 287; *State v. Kidd*, 89 Iowa 54, 56 N. W. 263; *State v. Smith*, 99 Iowa 26, 68 N. W. 428, 61 Am. St. 219; 23 Am. & Eng. Ency. Law (2d ed.), 88. As said by Chief Baron Gilbert, relative to communications to attorneys: "Where the original ground of communication is *malum in se*, as if he be consulted on an intention to commit a forgery or perjury, this can never be included within the compass of professional confidence; being equally contrary to his duty in his profession, his duty as a citizen, and as a man." 1 Gilbert, Evidence, 277.

The matter of difficulty in this case is the segregation of the competent from the incompetent. We think, however,

that the questions asked were fairly calculated alone to develop that which was competent. If the deceased requested the physician to perform a criminal abortion upon her person, as the offer to prove tended to show, that fact could have been developed as a proper introductory fact, and that would furnish the basis for a showing in a negative way that the proper subject on which professional advice had been sought and given had no relation to an abortion and was no longer under discussion. This being shown, it would *prima facie* appear that the balance of the conversation was not privileged.

The statute under consideration is highly beneficent in its operation, and it should not be frittered away by permitting the answering of questions which tend to reveal that which should be kept inviolate. All doubtful points must be solved against the competency of the proposed testimony, but if counsel, by a line of questions, can develop the isolated point concerning which the court can say this is competent, and at the same time avoid the disclosure of that which should be kept sacred, it is his privilege to pursue that course. In the case of *McDonald v. McDonald*, 142 Ind. 55, where the court below has let in evidence of a disclosure to an attorney, although it was claimed that the conversation opened with a prior professional communication, this court held that the subsequent statement was competent, by way of admission, on the ground that the opening and subsequent statements were as separate and distinct as though they had been made at different times.

It is objected by the State that the evidence of the statements of the deceased that we have been discussing would not necessarily contradict anything in the dying declaration. The conversation with the physician was subsequent to the date that deceased fixed as the date that she used the catheter that she declared appellant furnished her, and therefore we think that the evidence offered would have been in contradiction of her declaration. If there were any

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doubt upon this point we think that it ought to be solved in favor of appellant, as he was unable to cross-examine the declarant.

It is further shown by the record that after the deceased had, in a measure, recovered from the illness occasioned by the abortion, the same physician, who had performed proper professional service in the effort to relieve her from the consequences of such abortion, called upon her to collect the amount of his bill. The physician was asked by appellant's counsel whether at that visit he had any conversation with deceased except that which pertained to the collection of his bill. The witness answered: "None that I can recall; no more than a physician would have with a patient generally.—ask them how they were." In response to an appropriate question, appellant then proposed to prove that on that occasion the witness asked deceased about the payment of the bill, and that she said to him that she was not able to pay it; that he then asked her if Joe Seifert would pay it, and that she answered: "No, Joseph Seifert had nothing to do with producing my condition. He didn't advise it, and he didn't advise me to commit an abortion, and won't pay a dollar." The offer to prove was refused, and appellant excepted. The State had before called this witness, and proved by him the physical condition of deceased when he attended her, so there was nothing in the proposed evidence that was new except as to what she at that time said about appellant. We perceive no reason for excluding the evidence of such conflicting statement. The witness had not called on the deceased in a professional capacity, but on a business matter; she was aware of the object of his call, and neither sought nor obtained his advice. Even the relation had apparently ended at that time, since he was seeking compensation for his services. We think that it would be a perversion of the statute to hold that the communication in question was privileged. See *Bower v. Bower*, 142 Ind. 194.

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At the proper time, appellant tendered an instruction to the effect that, in determining what weight should be given to the dying declarations, the jury might consider the fact that according to her own admission therein the declarant had used the catheter upon her person to produce an abortion. The court refused so to instruct, and appellant reserved an exception. The deceased was not strictly an accomplice (*Johnson v. State*, 2 Ind. 652), but the moral quality of the act and her connection with it were such as to entitle the appellant to have said instruction given to the jury. *State v. McCoy*, 52 Ohio St. 157, 39 N. E. 316; *Commonwealth v. Boynton*, 116 Mass. 343; 1 Cyc. Law & Proc., 190, 191, and cases there cited; 1 Ency. Ev., 60. And see *Union, etc., Ins. Co. v. Buchanan*, 100 Ind. 63, 81; *Stevens v. Leonard*, 154 Ind. 67, 77 Am. St. 446.

For the errors mentioned, the judgment is reversed, and a new trial ordered.

STATE, EX REL. KELLY, v. MORGAN.

[No. 19,888. Filed April 28, 1906.]

EXEMPTIONS.—*Debt Must be Founded on Contract.*—Under the provisions of §715 Burns 1901, a resident householder can claim an exemption of his property from sale on execution, or other final process from a court, only when such execution or other process is issued on a judgment for a debt growing out of or founded upon a contract, express or implied. *p.* 475.

SAME.—*Money Won at Gaming.*—The judgment defendant, in a suit by the State, under §6678 Burns 1901, to recover, for the benefit of the wife of the loser, money lost at gaming, is not entitled to the benefit of the exemption laws of the State as against an execution on such judgment. *pp.* 475-479.

From Greene Circuit Court; *O. B. Harris*, Judge.

Mandamus by the State on the relation of Matthew Kelly against John D. Morgan, sheriff, to compel defendant to set apart to him as exempt from sale on execution certain personal property. From a judgment for defendant, plaintiff appeals. *Affirmed.*

State, *ex rel.*, v. Morgan.

E. E. Hastings, M. S. Hastings, J. G. Allen and J. C. Billheimer, for appellant.

C. K. Tharp, for appellee.

MONKS, J.—Under the provisions of §§6675-6680 Burns 1901, §§4950-4955 R. S. 1881 and Horner 1901, the State of Indiana recovered a judgment for \$9,000, and costs of suit against Dallas Tyler and the relator Matthew Kelly, for the benefit of the wife of Richard C. Davis, for money lost by said Davis to said Tyler and Kelly by betting on certain games. Said action was brought and judgment recovered in the name of the State, for the benefit of the wife of the loser in said games, by virtue of §6678, *supra*. An execution was issued on said judgment to appellee, as sheriff of Daviess county, and this action was brought by the relator, who was a resident householder of said county, to compel appellee, by writ of mandamus, to set apart to him as exempt from sale on said execution certain personal property. A trial of said cause resulted in a judgment in favor of appellee.

If the relator was entitled to the benefit of the exemption laws of this State as against said execution, said judgment must be reversed; if not, the judgment of the trial court must be affirmed. Under the provisions of our exemption law, a resident householder can claim an exemption of his property from sale on execution or other final process from a court only when such execution or other process is issued on a judgment for a debt growing out of or founded upon a contract, express or implied. §715 Burns 1901, §703 R. S. 1881 and Horner 1901; *State, ex rel.*, v. *McIntosh*, 100 Ind. 439, 441, 442, and cases cited; *Russell v. Cleary*, 105 Ind. 502, 504, 505, and cases cited; *Ross v. Banta*, 140 Ind. 120, 141, 142; *Donaldson v. Banta*, 5 Ind. App. 71.

The question is, therefore, was the cause of action on which said judgment for \$9,000 was rendered one growing out of or founded upon a contract. By statute, in this State, all "playing or betting at or upon any game or

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wager" is declared unlawful (§2176 Burns 1901, §2081 R. S. 1881 and Horner 1901); and all contracts in which the consideration, or any part thereof, is for money or other valuable thing won on the result of any wager or for repaying any money lent at the time of such wager, for the purpose of being wagered, are declared void. §6675, *supra*. Section 6676, *supra*, provides: "If any person by betting on any game, or betting on the hands or sides of such as play at any game, shall lose to any one any money, or valuable thing, and shall pay or deliver the same, or any part thereof, the person so losing and paying, or delivering the same, may, within six months next following, recover the money or other valuable thing so lost and paid or delivered, or any part thereof, with costs of suit, by action founded on this act, to be prosecuted in any court having jurisdiction thereof." It is provided by §6678, *supra*, that if the losing party shall not, within the time fixed in §6676, *supra*, in good faith, "sue and with effect prosecute for the money or thing so lost and paid or delivered, it shall be the duty of the prosecuting attorney, on information filed with him * * * to sue for and recover the same in the name of the State, with costs of suit, against any such winner, for the benefit of the wife or minor children, or either of them, if living, in the order herein named, of the person losing the same; and in case there shall be no such wife or minor children, then for the benefit of common schools." Without said statute, money or other property lost at gaming could not be recovered. The whole transaction being in violation of law, the winner has no title to the money, or other property lost to him, and the loser could recover the same, but for the rule that the loser and winner are *in pari delicto*. Under such circumstances the common law leaves them where it finds them. *Ervin v. State, ex rel.*, 150 Ind. 332, 336, 342, 343, and cases cited.

It was said by this court in *Ervin v. State, ex rel.*, *supra*, page 342: "The action authorized by the statute under

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consideration is one that could not be maintained at common law. Because of the parties to the bet being *in pari delicto* the common law would leave them where they placed themselves. *Woodcock v. McQueen*, 11 Ind. 14; *M'Hatton v. Bates*, 4 Blackf. 63. Nor would the action lie at common law to recover the money in the name of the State, or anybody else, for the benefit of the wife or children of the loser, nor for the benefit of the common schools. In other words, the legislature in passing the statute intended to create a new right of action that had no existence at common law, and such a right of action as could rest alone upon the statute."

It was held, in *State, ex rel.*, v. *McIntosh*, 100 Ind. 439, 441, 442, *Russell v. Cleary*, 105 Ind. 502, 505, 506, *Ross v. Banta*, 140 Ind. 120, 141, 142, and cases cited, "That costs are not a matter of contract, but are given or withheld by statute," and that, therefore, when an execution is issued upon a judgment for costs alone, the execution defendant, although a resident householder, can not claim any property as exempt from sale on such execution. It would seem, therefore, if the right of the State to recover money or other property lost at play from the winner is given by, and rests alone upon, the statute, as held in *Ervin v. State, ex rel.*, *supra*, that the winner, under the cases cited, would not be entitled to the benefit of the exemption law as against an execution issued on a judgment against him in favor of either the loser or the State.

Counsel for the relator insist that said action by the State to recover the money lost by said Davis to Tyler and the relator was founded on an implied contract; citing *Bristow v. James*, 7 T. R. 253; *Meech v. Stoner*, 19 N. Y. 26; *McDougall v. Walling*, 48 Barb. 364, 370. The cases cited by relator were brought by the loser or his assignee; and, even if they hold that the loser's right to recover in such cases arises out of contract, express or implied—a question we need not and do not decide—they do not support rela-

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tor's contention that the State's right to recover in such cases for the benefit of the wife of the loser, or his minor children, or for the benefit of the common schools, grows out of or is founded upon a contract, express or implied. Whatever may be said of the loser's right to recover, it is clear that the right given the State by §6678, *supra*, is a penalty intended to suppress the vice of gambling.

The New York statute gave the loser three months within which to sue for and recover from the winner the money lost and paid to him. Section 15 of said act (R. S. N. Y. 1829, p. 663) provided that in case the person losing the money shall not, within the time fixed, in good faith and without collusion, sue for the money lost and paid, and prosecute such suit to effect, without unreasonable delay, the overseers of the poor of the town where the offense was committed may sue for and recover the sum so lost and paid, together with treble the said sum, "from the winner, for the benefit of the poor."

In *Meech v. Stoner, supra*, the court decided that the loser's right to recover is based upon the duty of the winner to restore the money won, and that the statute merely abrogated in such cases the rule of the common law that the loser is without a remedy, because *in pari delicto* with the winner; but the court also held that said §15, *supra*, was not based on the duty of the winner to restore the money won, but was a penalty intended to repress gambling. The same is true of §6678, *supra*, of the statutes of this State. The statute first provides for restitution between the parties, if claimed within the time fixed; if not so claimed then the penalty attaches in favor of the State for the benefit of the wife or minor children of the loser, if living, in the order named, and if there be no wife or minor children, then for the benefit of the common schools.

It can not be said that the winner owes any duty to restore the money won by him to the State, for the benefit of the wife or minor children of the loser, or for the bene-

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It of the common schools, or that the abrogation of the disability of the loser to maintain such action gave to the State any right to recover. The State's right to recover depends upon the statute alone as held by this court in *Ervin v. State, ex rel.*, 150 Ind. 332, 342, 343, and the amount recovered is a penalty to suppress gambling. It follows that the relator was not entitled to an exemption of his property against said execution. Judgment affirmed.

LANDES ET AL. v. STATE, EX REL. MATSON.

[No. 20,066. Filed April 28, 1903.]

MUNICIPAL CORPORATIONS.—*Ordinances*.—The act of 1899 (Acts 1899, p. 125) does not affect the powers of common councils to pass ordinances, nor the duties directed of city officers with respect to the enrolling, attesting, and signing of the same, except to invest the mayor with the right of veto. p. 485.

SAME.—*Ordinances*.—The provisions of the act of 1899 (Acts 1899, p. 125) as to the enrollment, attestation, and approval by the mayor of a city ordinance are merely directory, and the appointment of officers under an ordinance is not invalid because the appointment was made before the ordinance was enrolled, attested, and signed by the clerk as directed by said act. pp. 484, 485.

SAME.—*Ordinances*.—*Passage*.—*Parliamentary Law*.—In a proceeding to remove members of a city council appointed under an ordinance increasing the number of city wards, on the ground that the ordinance was passed on first reading without a suspension of the rules, an allegation in the complaint, that §18, article 4, of the state Constitution, which requires that every bill shall be read by sections on three several days, unless the three several readings are dispensed with by a two-thirds vote "is a general rule of parliamentary law," will be regarded as a conclusion of the pleader, in the absence of an averment that the council had adopted it as one of its governing rules. pp. 488, 489.

SAME.—*Ordinances*.—*Passage*.—*Parliamentary Law*.—Where the rules of order of the common council of a city provided that the general rules of parliamentary law, so far as the same were applicable, should be considered the rules of the common council, the common council has the right to determine what rules are general and their applicability to the business before them, and the court can not say as a matter of law that it was incumbent upon the council to read a certain ordinance on three several days before its final passage or that a single reading was insufficient. p. 489.

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From Putnam Circuit Court; *P. O. Colliver*, Judge.

Information by the State on the relation of *Smith C. Matson*, prosecuting attorney, against *Frank L. Landes* and others. From a judgment overruling a demurrer to the complaint and sustaining a demurrer to an answer, defendants appeal. *Reversed.*

B. F. Corwin, S. A. Hays, B. K. Elliott, W. F. Elliott and *F. L. Littleton*, for appellants.

S. C. Matson, P. A. Mathias, H. H. Mathias and *G. A. Knight*, for appellee.

HADLEY, C. J.—Information by the prosecuting attorney for a judgment of ouster against appellants from exercising the office of common councilmen of the city of Greencastle, to which office they claim to have been appointed by the common council of that city.

The information, in substance, charges that on the 13th day of May, 1902, and ever since 1867, Greencastle was a city, duly incorporated under the general laws of the State of Indiana for the incorporation of cities; that said city, upon its incorporation, was divided into three wards, and elected a common council, composed of six members, two from each ward; that said city was so divided and said common council so composed on said 13th day of May, 1902; that on said date, and at a regular meeting of said common council, all the councilmen and mayor being present, an ordinance was introduced for the purpose of dividing said city into wards and voting precincts, and redistricting said city for ward and voting precinct purposes and for the purpose of holding city elections; that upon said ordinance being read at said meeting, the same was put upon its passage, and upon the call of the yeas and nays three of the councilmen voted in favor of said ordinance and three refused to vote; that thereupon the mayor, treating said vote as a tie, voted for said ordinance, declared the same adopted, and before the adjournment of said meeting attached his signature thereto; that by the terms of said

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ordinance said city was divided into four wards, and their boundaries defined; that immediately after the passage of said ordinance as aforesaid the common council, at said meeting, appointed the defendants as councilmen to fill the pretended vacancies occasioned by the creation of an additional ward in said city; that immediately after their said election or appointment as aforesaid the defendants were duly sworn as councilmen, and took their seats as such at the next meeting, and have ever since continued to act as such under and by virtue of said appointment; that the defendants wrongfully and unlawfully hold said offices of councilmen, and have no legal title thereto, because: (1) The said ordinance creating said pretended vacancies which the defendants were appointed to fill was not legally and validly adopted, for the same was not enrolled, attested, and signed by the clerk before being signed by the mayor, as required by §1 of the statute approved February 24, 1899. (2) No record of the time of the presentation of said ordinance to the mayor was ever made by the clerk, as by said §1 of said statute provided. (3) On the 26th day of August, 1890, the common council of said city, by an ordinance duly established and adopted, prescribed certain rules and regulations for the government of the city council, its officers, and officers connected with the city government, which ordinance was in full force and effect on said 13th day of May, 1902, among which rules are the following: "29. The general rules of parliamentary law, so far as the same are applicable, are to be considered the rules of the common council, unless the same conflict with any of the rules herein prescribed." "31. No rule shall be suspended, except by an affirmative vote on call of the roll by two-thirds of the members of the council." That the following is a general rule of parliamentary law in force on said 13th day of May, 1902, and ever since, as prescribed by §18, article 4, of the Constitution of the State of Indiana, to wit: "Every bill shall be read, by

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sections, on three several days, in each house; unless in case of emergency, two-thirds of the house where such bill may be depending shall, by a vote of yeas and nays, deem it expedient to dispense with this rule," and is also a general rule of parliamentary law in general use in legislative bodies; that at the time of the pretended adoption of said ordinance, dividing said city into four wards, by said common council at said meeting on said 13th day of May, 1902, said ordinance was read only once at the meeting, and had never been read at any previous meeting; that the common council at said meeting failed and neglected to pass any motion or resolution suspending said rule twenty-nine by an affirmative vote, on call of the roll, by two-thirds of the members of said council, but attempted to establish and adopt said ordinance in disregard of rules twenty-nine and thirty-one; that said defendants have not, nor has either of them, any legal title or right to the office of councilman of said city, because he says: (4) The defendants were elected or appointed by said council before said ordinance dividing said city into four wards was signed by the mayor of said city. (5) The defendants were elected or appointed by said common council, took the oath of office, and their seats as such councilmen before said council caused notice of its action in passing said ordinance to be given by three publications for three successive weeks, one month before an election, in two papers of opposite politics published in said city. (6) The common council had no authority to fill vacancies occasioned by their creation of new or additional wards. (7) Under the statutes of Indiana, the only method of filling vacancies occasioned by the creation of new or additional wards in cities is by special election, called for that purpose by the common council of such cities. Prayer that said offices be declared vacant, etc.

Appellants' demurrer to the information was overruled. They then filed an answer, to which appellee's demurrer

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was sustained. Appellants elected to stand upon their answer, and, refusing to plead further, judgment was rendered ousting them from the offices. The overruling of the demurrer to the complaint, and the sustaining of the demurrer to the answer, are assigned as error.

This opinion may be much abridged by eliminating certain questions that arise upon the face of the complaint, which have been heretofore decided, or been waived or conceded by appellee to be untenable. These are as follows: (1) The authority of the common council to divide the city into wards, and to create new and additional wards, under §3470 Burns 1901, is taken as granted, because not called in question. (2) When, in such division of a city, a new and additional ward is established, and vacancies in the office of common council thus result, the common council have the power to fill such vacancies by appointment. §3484 Burns 1901; *Landes v. Walls, ante*, 216. (3) The publication of notice of the adoption of the ordinance, required by §3471 Burns 1901, does not postpone the taking effect of the ordinance until after the time fixed for publication has expired. *Landes v. Walls, supra*. (4) It is alleged in the complaint that the common council of the city was composed of six members, and that at the time the ordinance redistricting the city was voted upon all members of the council were present, and that three voted for the ordinance and three refused to vote. Appellee concedes that councilmen present and refusing to vote are to be deemed as voting in the affirmative, and that the question must be treated as if the ordinance received the unanimous vote of the council. See, also, *Rushville Gas Co. v. City of Rushville*, 121 Ind. 206, 6 L. R. A. 315, 16 Am. St. 388.

The validity of the ordinance is further questioned upon two grounds: (1) For failure to comply with the requirements of §1 of the act of 1899 (Acts 1899, p. 125); and (2) for a violation of the rules prescribed by the council for its government.

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I. Section 1 of the act of 1899, *supra*, is as follows: "That in all incorporated cities which had a population of less than 30,000 inhabitants, according to the census of 1890, every ordinance of the common council, shall immediately upon its enrollment, attestation and signature of the clerk, be presented by him to the mayor, and a record of the time of such presentation made by the clerk. If the mayor approves it, he shall sign it and it shall become a law; if he does not approve it, he shall return it to the clerk with his objections in writing within ten days after receiving it and the clerk shall present the same to the common council at its next meeting. It shall be the official duty of the mayor to express in writing his disapproval as hereinbefore provided. If for any reason within the ten days, the mayor fails to disapprove the same in writing, it shall be deemed equivalent to approval and in all cases of disapproval by the mayor, the same shall not become a law unless the body in which the measure originated within thirty days after the time named by the mayor's action, again pass the same by a majority vote of the members of the common council elect."

Prior to the adoption of this act of 1899 the only statute relating to the record or other authentication of an ordinance of a city of this class was the following, which is still in force: "All by-laws and ordinances shall, within a reasonable time after their passage, be recorded in a book kept for that purpose, and shall be signed by the presiding officer of the city, and attested by the clerk. On the passage or adoption of any by-laws, ordinance or resolution, the yeas and nays shall be taken and entered on the record." Acts 1867, p. 72, §78, §3534 Burns 1901.

It will be observed that the act of 1867 provides that within a reasonable time after their passage all ordinances shall be recorded, signed by the presiding officer of the city, and attested by the clerk. These things however have been adjudged directory only, and a failure to observe them will

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not invalidate an ordinance. *Martindale v. Palmer*, 52 Ind. 411; *Shea v. City of Muncie*, 148 Ind. 14, and authorities cited.

It is manifest that the legislature in the enactment of 1899 made no attempt to avoid the construction put by this court upon the act of 1867, *supra*, relating to the registration and signing of ordinances, or make any change with respect to the mode of authentication, or preservation of such enactments. In the act of 1899, *supra*, it is expressly provided that an ordinance may become a valid law without the signature of the mayor in two ways: (1) By the mayor, for any reason, failing for ten days to sign it; and (2) by the council passing the same over his veto. Under this act the only virtue imparted by the mayor's signature of approval is to give immediate effect to the ordinance, and waive his right of veto. When these two statutes are read together, as they should be, it becomes clear that the only purpose of the General Assembly, in the passage of the act of 1899, was to confer the veto power upon mayors. This is shown by the title of the act, which must be accepted as indicating and defining the subject legislated upon. It is as follows: "An act providing that mayors of incorporated cities having less than 30,000 inhabitants according to the census of 1890, have the power to veto ordinances and resolutions passed by the common councils, and repealing all laws in conflict, and declaring an emergency." Acts 1899, p. 125.

If required to construe the act as abridging existing powers of the common council; or as making the previous registration and signing of an ordinance by the mayor essential to the validity of an ordinance, it should be held unconstitutional, because the subject is not embraced within the title. Art. 4, §19, Indiana Constitution. So it is plain that the legislation of 1899 did not affect the powers of common councils to pass ordinances, nor the duties directed of city officers with respect to the enrolling, attesting,

and signing of the same, except to invest the mayor with the right of veto. Entering, then, the wider field of the law, we find that it is an ancient rule in the exposition of statutes that when duties are imposed upon public officers which affect the rights and duties of others, and time of performance is stated in such language as does not deprive the officer of the power to perform after the time prescribed, such statute, in relation to the time for the discharge of such duties, must be regarded as directory, and not as mandatory, or as essential to the validity of the proceeding. *Martindale v. Palmer*, 52 Ind. 411; *Jones v. Carnahan*, 63 Ind. 229; *Sackett v. State, ex rel.*, 74 Ind. 486; *Wampler v. State, ex rel.*, 148 Ind. 557, 38 L. R. A. 829; *Smith's Comm.*, §§670, 674; *Sutherland, Stat. Const.*, §448.

In the *Martindale* case it was held that a contract for street improvement was valid though made before the ordinance authorizing it was signed by the mayor.

In the *Jones* case an execution was sustained that was issued upon a judgment of the circuit court before the same was recorded, read in open court, and signed by the judge, as required by the statute.

In the *Sackett* case the election of a school trustee by the city council at a date subsequent to the time fixed by the statute was held good.

In the *Wampler* case the same principle was applied to the election of a county superintendent by the township trustees.

All these cases proceed upon the theory that statutes prescribing a time and manner of doing an official act, without denying the right to do it at some other time, must be held directory merely, unless the language employed or character of the act to be done forbids such a construction.

In §670 *Smith's Comm.*, the author says: "Where a statute directs a person to do a thing in a certain time, without any negative words restraining him from doing it

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afterwards, the naming of the time will be considered as directory to him, and not as a limitation of his authority."

Sutherland, in §448, *supra*, says: "The cases universally hold that a statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory, unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered as a limitation of the power of the officer."

The law looks at the substance, and not at the shadow of things. In the passage of an ordinance the essential thing is that it receives the requisite number of votes at a proper meeting of the council. And in ordinary cases, and in the absence of a specific mandate, the law will not suffer the power of the council to pass an ordinance, or the rights of one springing from such an act, to be set at naught by the neglect or failure of an officer of the city to perform some ministerial duty in relation thereto, strictly within the time and manner directed of him by the statute. There is no pretense here that the ordinance was not completed in every respect as required by the statute. The only complaint is that it was not orderly done. The averments of the information are, in effect, that the ordinance received the unanimous vote of the common council elect; "that the mayor * * * declared the same adopted, and before the adjournment of said meeting attached his signature thereto;" "that the same was not enrolled, attested, and signed by the clerk before being signed by the mayor;" "that the defendants were appointed by said council before said ordinance was signed by the mayor of said city."

If the council had the authority to pass the ordinance, and it did pass it at a regular meeting, by a unanimous vote of the councilmen elect upon a call of the yeas and nays, as is conceded by appellee, what difference can it make to any member of the public, represented by the

relator, whether the steps leading up to appellants' appointment were taken precisely in the order contemplated by the statute or in somewhat different order? It is nowhere averred that the ordinance was not recorded in the book kept for that purpose, and attested and signed by the clerk and mayor after its passage, and before the meeting adjourned; and, presuming that public officers do their duty, we must presume that these things were done. And if, while the clerk was engaged in enrolling the ordinance, in the interests of time and the dispatch of business, the council proceeded to and did elect the appellant to the vacancies created, and the ordinance was passed, registered, attested, and signed by the clerk and mayor, and appellants appointed at the same meeting, and all was accomplished before the meeting of the council adjourned, we perceive no such fault or irregularity in the proceeding as will annul the ordinance or vitiate the appointment of appellants thereunder.

II. The further point is made that the redistricting ordinance is void for failure of the council to observe, in its passage, rules twenty-nine and thirty-one adopted by that body for its government. These rules are: "29. The general rules of parliamentary law, so far as the same are applicable, are to be considered the rules of the common council, unless the same conflict with any of the rules herein prescribed." "31. No rule shall be suspended, except by an affirmative vote on call of the roll by two-thirds of the members of the council."

It is averred in the complaint that §18, article 4, of the state Constitution, which requires that every bill shall be read by sections on three several days, unless the several readings are dispensed with by a two-thirds vote, is a general rule of parliamentary law; and from this premise it is argued that the single reading and vote upon the ordinance, without a suspension of the rule, was a nullity, and im-

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parted no vitality to the act. In support of his position the relator cites said section of the state Constitution, and Rules and Practice of National House of Representatives by Hinds, pp. 137, 138.

Parliamentary law as generally understood means "the rules and usages of parliament, or of deliberative bodies." Webster's Int. Dict. "The recognized usages of parliament and legislative assemblies by which their procedure is regulated." Bouvier's Law Dict. Thus it appears that a rule of parliamentary law is a rule created and adopted by the legislative or deliberative body it is intended to govern. It is, therefore, quite different from a provision of the Constitution which the people have set up as defining and limiting the powers and duties of the legislature. The former is subject to revocation or modification at the pleasure of the body creating it, while the latter is the law of its being, and prescribes the terms upon which it has power to act at all. The averment, therefore, that §18, article 4, of the Constitution, "is a general rule of parliamentary law," must be regarded as a conclusion of the pleader, in the absence of an averment that the council had adopted it as one of its governing rules.

Another view: The language of rule twenty-nine is: "The general rules of parliamentary law, so far as applicable, are to be considered the rules of the common council." Who but the council themselves are to determine what rules are general rules, within the meaning of their rule twenty-nine? And who but they are to determine what parliamentary rule is applicable to the business before them? Outside the things enjoined by the statute, city councils are authorized to conduct their proceedings according to rules of their own adoption, keeping in view the public interest, and the faithful discharge of their duties; and in this case, in the absence of a statute, or of a rule duly established, requiring it, we can not say as a matter of law that it was incumbent

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upon the council to read the questioned ordinance three times on three several days before its final passage, or to say that a single reading was insufficient.

For these reasons we are of opinion that the information does not state sufficient facts to entitle appellee to judgment against appellants. The judgment is therefore reversed, with instructions to sustain appellants' demurrer to the information.

Jordan, J., did not participate in the decision of this case.

STATE, EX REL. ZUELLY, ET AL. v. CASPER ET AL.

[No. 19,733. Filed April 29, 1903.]

PLEADING.—*Action Against County Auditor to Recover County's Money.*—

State as Party.—In an action against a county auditor to recover money belonging to the county, the State is not a proper party plaintiff, and the error in making the State such a party is not cured by the joinder of taxpayers as relators.

From Perry Circuit Court; *E. M. Swan*, Judge.

Action by State on the relation of Adolph Zuelly and others against Martin F. Casper and others. From a judgment for defendants, the relators appeal. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

S. H. Esarey, for appellants.

Philip Zoercher, J. L. Suddarth, W. T. Zenor and M. D. Casper, for appellees.

DOWLING, J.—On motion of counsel for appellants, this cause was consolidated with No. 19,732, in which Adolph Zuelly, Henry H. Bielefeld, and Frederick D. Wichser were appellants, and Martin F. Casper and the board of commissioners of the county of Perry were the appellees. No objection to such consolidation was made on behalf of the appellees, and the motion was granted without an exam-

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ination of the sufficiency of the grounds therefor. Upon a more careful reading of the record, we are satisfied that the order of consolidation was improvidently made, and the same is set aside.

This action was brought in the name of the State of Indiana on the relation of Adolph Zuelly, Henry H. Bielefeld, and Frederick D. Wichser against Martin F. Casper and the board of commissioners of the county of Perry to recover from Casper, a former auditor of said county, certain moneys belonging to the county alleged to have been wrongfully received by him as such auditor, and for which the board of commissioners of said county refused to sue. Demurrers to the complaint on the ground of a want of sufficient facts, want of capacity of the plaintiff to sue, and a defect of parties plaintiff were sustained by the trial court, and judgment thereon was rendered for the appellees respectively.

The action was not on the bond of the auditor. The title to the moneys sued for was in the county, and not in the State. The latter, therefore, was not a proper plaintiff, and the error in the pleading was not cured by the joinder of the three taxpayers as relators. The latter, as the representatives of all taxpayers having a common interest, had the right to sue in their own names for the use of the county, and of the other taxpayers thereof. *Zuelly v. Casper*, *ante*, 455.

The State, not being the owner of the moneys sued for, nor having any interest therein, was not authorized to maintain an action therefor. *People v. Ingersoll*, 58 N. Y. 1, 17 Am. Rep. 178; *People v. Booth*, 32 N. Y. 397.

The court did not err in sustaining the demurrers to the complaint. Judgment affirmed.

Rabb v. McAdams.

RABB v. McADAMS.

[No. 20,118. Filed April 29, 1903.]

COURTS.—*Construction of Act Changing Term.*—Section 1 of the act of March 9, 1903, provides that "hereafter the circuit court in Fountain county shall begin on the last Monday in August of each year and continue for five weeks." Section 2 is an emergency clause. *Held*, that the act does not change the time of holding court in said circuit until the last Monday in August which was the beginning of the court year under said act.

From Tippecanoe Circuit Court; *R. P. De Hart*, Judge.

Suit by Charles V. McAdams against Joseph M. Rabb, Judge of the Warren Circuit Court, to enjoin the latter from convening court on certain days. From a judgment for plaintiff, defendant appeals. *Reversed*.

J. M. Rabb, for appellant.

C. V. McAdams, for appellee.

MONKS, J.—On March 9, 1903, the following act was approved by the Governor and filed in the office of the Secretary of State: "Section 1. That hereafter the circuit court of Fountain county, Indiana, shall begin on the last Monday in August of each year and continue for five weeks, and in Warren county, Indiana, on the Monday following the term of court in Fountain county, and shall continue in session three weeks, and in Benton county on the Monday following court in Warren county, and shall continue in session three weeks, and in Fountain county again on the Monday following the court in Benton county, and terms of court in each county shall continue in the order above named and be continuously in session until the court in each county has held four terms of court during the year. It is intended by the foregoing that the terms of court shall continue for the length of time above mentioned, provided the business of such court shall demand. Section 2. Whereas an emergency exists for the immediate taking

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effect of this act, the same shall be in effect from and after its passage." Acts 1903, p. 321.

The question presented by this appeal is whether or not said act changes the time of holding court in said circuit before the last Monday in August, 1903. It is expressly provided in said act that: "Hereafter the circuit court in Fountain county shall begin on the last Monday in August of each year and continue for five weeks." The commencement of the court year is thereby fixed on the last Monday of August, 1903, and on the last Monday of August each year thereafter. It will be observed that the times for holding all the terms of court in said circuit, except the one commencing in Fountain county on the last Monday of August, are dependent upon, and must be determined from, that day. By the express provisions of said act the first term of court to be held thereunder commences in Fountain county on the last Monday of August after the taking effect of said act, which is August, 1903, the day of the beginning of the court year. No provision is made in said act for any term of court before that date, but all the terms of court provided for therein must be held on and after that date. It is clear that by its own terms said act shows that it does not change the time of holding court in said circuit until the beginning of the court year under said act. As said act of 1903, *supra*, has no repealing clause the act approved March 8, 1901 (Acts 1901, pp. 171, 172), fixing the time for holding court in said circuit, will be in force until the expiration of the court year as fixed by said last-named act.

No question concerning the jurisdiction of the court below is argued by the parties, and the same is not considered or determined.

Judgment reversed

KNICKERBOCKER ICE COMPANY v. LEWIS.

[No. 19,724. Filed April 30, 1903.]

APPEAL AND ERROR.—Bill of Exceptions Without Formal Introduction.—

A document incorporated in the record and signed by the trial judge as a bill of exceptions containing the evidence, can not on appeal be treated as such, where it contains no formal introduction. *p. 497.*

SAME.—Record.—Bill of Exceptions.—“Insert.”—Where a transcript recites the filing of a bill of exceptions, and directs it to be set out by the word “insert,” the bill of exceptions should appear in the transcript immediately following the recital of its filing; otherwise it can not be considered on appeal. *p. 498.*

From the Laporte Circuit Court; *J. C. Richter*, Judge.

Suit by William H. Lewis against the Knickerbocker Ice Company. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

M. R. Sutherland, for appellant.

W. A. Mc Vey and *F. E. Osborn*, for appellee.

JORDAN, J.—This action was prosecuted by appellee in the lower court to quiet title to certain described lands situate in section thirty-four, township thirty-seven north, range three west, in Laporte county, Indiana, and perpetually to enjoin appellant from continually trespassing thereon by cutting and taking ice from an unnavigable lake known as “Stone lake,” which covered or submerged a portion of the lands of which appellee alleged in his complaint he was the owner in fee simple and in possession thereof. The cause was tried on an amended complaint consisting of four paragraphs, to each of which a demurrer for insufficiency of facts was overruled. The case was put at issue by appellant filing a general denial in answer to the complaint. The court, upon request, made a special finding of facts, and stated conclusions of law thereon favorable to

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appellee, and, over appellant's motion for a new trial, rendered judgment quieting appellee's title to the premises, and perpetually enjoining appellant from entering upon, cutting, and removing ice from the lake situated upon the lands in controversy.

From this judgment appellant appeals, and the errors assigned are: "(1) That the court erred in overruling the demurrer to the first, second, third, and fourth paragraphs of the complaint; (2) that the court erred in overruling the motion for a new trial."

The only attempt by counsel to argue that the trial court erred in overruling the demurrer to the complaint is made at the close of appellant's brief. After summing up the evidence, and attempting to show that it is insufficient to support the court's finding, and that the judgment is contrary to law, counsel for appellant state: "The decisions of this State hold that the owner of the dry land takes the whole subdivision. The theory as herein expressed, it seems to us, would be in perfect harmony with these decisions where there are two or more owners abutting the lake in the same division. What we have said upon this theory applies to the demurrer which was filed to the complaint and which was overruled. Of course there is not much on the face of the complaint that shows that there are two or more owners abutting the lake in this same subdivision, but from the allegations in the complaint that the plaintiff claims ownership of the submerged bed of the lake lying between the north and south lines of the lots to the quarter section line, instead of the whole quarter section, leaves a strong inference that there are other owners that have riparian rights in the same waters."

None of the paragraphs of the complaint can be said either expressly or inferentially to show that any person other than plaintiff is the legitimate owner and in possession of the *locus in quo*. The complaint, therefore, is not

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open to the above objection. As no other infirmity of the complaint in question is pointed out, its sufficiency in other respects may be assumed.

Counsel for appellee urge several objections to the motion for a new trial, but, as the judgment must be affirmed for other reasons, we pass these without consideration.

All the questions discussed in behalf of appellant under the second assignment of error depend upon the evidence. Counsel for appellee, however, contend that the evidence is not properly in the record, and therefore these questions are not before the court for review. The evidence said to have been given on the trial was taken down by a shorthand reporter. The motion for a new trial was overruled at the May term, 1901, of the Laporte Circuit Court, and time was granted to file a bill of exceptions. On August 5, 1901, an entry in vacation was made which discloses that the defendant filed in the office of the clerk of the lower court what is denominated as "the longhand manuscript of the evidence." This entry is as follows: "William H. Lewis v. Knickerbocker Ice Company. August 5, 1901. Now comes the defendant herein by counsel and files its longhand manuscript of the evidence in the office of the clerk of the Laporte Circuit Court, in the words following, to wit: State of Indiana, Laporte County, ss. In the Laporte Circuit Court, December term, 1899. William H. Lewis v. Knickerbocker Ice Company. Counsel for plaintiff offered in evidence a certified copy of the original government survey of the south half of section thirty-four, township thirty-seven north, of range three west, which is marked exhibit 1, and is as follows, to wit." Here follow the document offered and also what purports to be other evidence offered in the case. At the close of this longhand manuscript is attached a certificate of the shorthand reporter, certifying that the "foregoing manuscript is a full, true, and complete copy * * * of the shorthand report of said evidence."

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Immediately after this certificate is the following: "And the defendant now here, to wit, on the 15th day of August, 1901, within the time fixed by the court, presents this, its bill of exceptions, to John C. Richter, Judge of the Laporte Circuit Court, and prays that the same be examined, approved, signed, sealed, and made a part of the record in the above entitled cause, which is accordingly done on this 14th day of September, 1901. John C. Richter, Judge of Circuit Court." On September 23, 1901, the following vacation entry in the cause was made: "William H. Lewis v. Knickerbocker Ice Company. Now comes the defendant herein by counsel and files its bill of exceptions in the office of the clerk of the Laporte Circuit Court, in these words: (insert)."

It is evident from the parts of the transcript herein set out that the evidence, together with the rulings and exceptions incident thereto, has not been made a part of the record by a bill of exceptions as the law requires. It is affirmatively disclosed that the document which the trial judge signed is the longhand manuscript of the evidence filed in the office of the clerk of the lower court on August 5, 1901, prior to its being signed by the judge. This document is entirely devoid of any formal beginning to show that it was intended as a bill of exceptions to serve the purpose of making the evidence given in the case a part of the record. It is nothing more nor less than what the entry recites, "the longhand manuscript of the evidence." There is no pretense whatever at the commencement of this document, or in the introductory part thereof, to indicate that it is a bill of exceptions making the evidence a part of the record, and it should not have been treated or signed as such by the trial judge. *Richwine v. Jones*, 140 Ind. 289. That it can not be regarded as a bill of exceptions containing the evidence is fully settled by many decisions of this court, among which we cite the following: *Jenkins v. Wilson*, 140 Ind. 544; *Wagoner v. Wilson*, 108 Ind.

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210; *Chicago, etc., R. Co. v. Wolcott*, 141 Ind. 267, 50 Am. St. 30; *Rohrof v. Schulte*, 154 Ind. 183; *Ewbank's Manual*, §29.

If the document in question could be considered as a bill of exceptions embodying the evidence, the entry in vacation does not show that it is the same identical bill which was filed after being signed and directed to be set out by the word "insert." All that is shown by this entry is that a bill of exceptions was filed "in these words" (insert). As there is nothing whatever set out in the transcript following the word "insert" which purports to be a bill of exceptions or a manuscript of the evidence, we are left wholly to conjecture or surmise in respect to the particular bill that was filed and directed to be inserted. Nothing appearing to the contrary, we may assume that some bill of exceptions in the case was filed with the clerk, which that official has failed to set out in the transcript. If one was filed, as the entry recites, it should appear in the transcript immediately following the entry or recital of its filing. *Miller v. Evansville, etc., R. Co.*, 143 Ind. 570.

It is evident that there has been a total failure to bring the evidence before this court by a bill of exceptions as required by the act of 1897 (Acts 1897, p. 244). Therefore the questions depending thereon can not be considered.

Judgment affirmed.

HIBBERD v. TRASK ET AL.

[No. 19,890. Filed May 1, 1908.]

WILLS.—*By Married Women.*—*Divorce.*—*Remarriage.*—Where a married woman executes a will and thereafter is divorced, her remarriage to her former husband does not, under §2732 Burns 1901, operate as a revocation of the will. pp. 501-504.

SAME.—*By Married Women.*—*Revocation.*—An agreement by a married woman with her husband that if he will not make a will and he should die before she died, she will make a will making certain gifts, does not operate to revoke her existing will, but at

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most creates a charge upon the property inherited by the wife from her husband in favor of the persons for whom she failed to make provision according to the agreement. *p. 504.*

PLEADING.—*Failure to Reply.*—*Judgment on Pleadings.*—Where a reply of confession and avoidance is filed to a good special answer, and a demurrer to such reply is sustained, the failure to reply further entitles the defendant to a judgment on the pleadings. *pp. 504, 505.*

From Wayne Circuit Court; *H. C. Fox*, Judge.

Suit by Milton L. Hibberd against Irene W. Trask and others. From a judgment for defendants, plaintiff appeals. *Affirmed.*

S. C. Whitesell, for appellant.

T. J. Study, for appellees.

DOWLING, J.—The complaint in this case alleged that the appellant, who was the plaintiff below, together with the defendant named therein, were the owners in fee simple of certain lands situated in Wayne county, Indiana; that each of them was the owner of the undivided one-seventh of said lands, and that they held said lands as tenants in common. It also averred that the appellee Irene W. Trask, one of the defendants, claimed to be the owner of the whole of said lands. Prayer that the title of said lands be quieted as against the said Irene W. Trask, that partition of the same be made among the said owners, and that their interests be allotted to them in severalty. All the defendants except Trask made default. The latter filed an answer in two paragraphs, the first being a general denial.

The special answer stated that one Anna L. Bickle died, testate, January 21, 1901, and that at the time of her death she owned in fee simple, in her own right, the whole of the real estate described in the complaint; that on April 4, 1865, being then over twenty-one years of age, and competent to execute a valid will, the said Anna L. Bickle made her last will in writing, which was duly attested, and that by said will the said testatrix devised all of her property,

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real and personal, to the said Irene W. Trask; that said will remained in force and unrevoked until the death of the said Anna L. Bickle, and that after her death, on January 26, 1901, the said will was duly admitted to probate in the circuit court of said Wayne county; that among the property so devised to her, the said Irene W. Trask, was the whole of the real estate described in the complaint, and that she was the owner in fee simple in severalty of the said lands; that the appellant had no title to or interest in the same, or in any part thereof, and was not entitled to have partition of said real estate.

To this answer the appellant filed a reply, stating that at the time of the execution of the supposed will of the said Anna L. Bickle, mentioned in the answer of the appellee Trask, the said Anna L. was the lawful wife of one William A. Bickle; that at the time of the execution of said will, the said Anna L. and William A. Bickle were estranged from each other and lived apart; that on March 6, 1866, in an action then pending in the Wayne Circuit Court, in the county of Wayne, and State of Indiana, wherein the said William A. Bickle was plaintiff and the said Anna L. Bickle was defendant, such proceedings were had that upon the trial thereof the said parties were by the judgment and decree of said court divorced from each other; that the alimony to be received by the said Anna L. Bickle, and certain other conditions of said divorce, were fixed by an agreement between the said parties, which was made a part of said decree, and is fully set out in said reply; that afterwards the said William A. Bickle and Anna A. Bickle were remarried to each other, and that the said Anna L. Bickle concealed from the said William A. Bickle the fact of the existence of the said will; that the said William A. had no father nor mother, but that he had six sisters living, one of whom was blind, an invalid, and partially dependent upon him for her support; that it was the desire of the said William A. that each of his sisters

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should have out of his estate the sum of \$2,000; that some time in June, 1894, he made known this desire to the said Anna L. Bickle, and requested that, if he died before she did, she would make a will, and by it give to each of his sisters the sum of \$2,000; that the said Anna L. promised him that if he would not make a will, and that if he died before she did, she would comply with the said request; that, relying upon the said promise, the said William A. Bickle died without making any other provision for his said sisters. On February 11, 1898, the said William A. Bickle died intestate, leaving the said Anna L. his widow and sole heir at law. It is also shown by the said reply that he left an estate valued at about \$100,000.

To the second paragraph of the appellant's reply a demurrer was sustained, and judgment was rendered upon this ruling. This decision is assigned for error.

Counsel for appellant insists that the will made by Mrs. Anna L. Bickle during her marriage to William A. Bickle, and before her divorce from him, was revoked by her subsequent marriage to him. In support of this proposition it is argued that upon her divorce Mrs. Bickle became an unmarried woman, and that under §2732 Burns 1901 her will previously made must be deemed revoked by such marriage.

In this State, by virtue of the statute, all persons except infants and persons of unsound mind are made competent to devise by last will and testament any interest descendible to their heirs which they may have in any lands, tenements, hereditaments, or personal property. §2726 Burns 1901, 2 R. S. 1852, §1, p. 308. By §2727 Burns 1901, §1, Acts 1859, p. 245, it was declared that the section just referred to was intended to empower, and did empower, married women as well as other persons, except infants and persons of unsound mind, to devise and bequeath their property, real and personal, by will. At the time of the execution of the will of Mrs. Bickle she was a married

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woman, and by the express terms of the statutes she was competent to devise her property in that way. The provision of the statute relied upon by counsel for appellant is as follows: "(5) After the making of a will by an unmarried woman, if she shall marry, such will shall be deemed revoked by such marriage." The class of persons whose wills are deemed to be revoked by subsequent marriage under this section are women who have made wills while unmarried. This provision, being in derogation of the general power to make wills conferred by the statute, and in the nature of an exception thereto, is to be strictly construed. It is true that at common law the marriage of a woman operated to revoke a will previously made by her, and among the reasons for that rule given in the decisions upon the subject it was stated that as a married woman was incapable under the common law of making a will, she was also incapable of revoking one. So that a will made by her before marriage would become irrevocable by her during a subsequent marriage, and, to prevent this result, the law treated her marriage as an act of revocation. The legislature of this State long ago removed the common law disability of married women to make and to revoke wills, and upon the removal of such disability the reason for the common law rule which treated the will revoked by marriage ceased to exist.

It will be observed that the language of the statute is that after the making of a will by an unmarried woman, if she shall marry, it shall be deemed revoked by such marriage. There is no reason why the courts, in giving a construction to this section, should change its evident meaning, or interpolate words not found within it. It is not the marriage of every woman which operates to revoke a will previously made by her. It is where the will has been made by an unmarried woman that such revocation occurs. It is entirely clear that if a will is made by a married woman who is afterwards divorced, or becomes a widow and mar-

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ries again, she is not such a person as is described in §2732, *supra*.

The methods by which wills may be revoked are distinctly stated in the statute of wills of this State, and it is declared that no will in writing, nor any part thereof, except as in the statute provided, shall be revoked, unless the testator, or some other person in his presence, and by his direction, with intent to revoke, shall destroy or mutilate the same; or such testator shall execute other writing for that purpose, signed, subscribed, and attested as required in the said act. §2729 Burns 1901. The second or subsequent marriage of a woman who, while married, had previously made a will, is nowhere made to operate as a revocation of such will. If the legislature had intended the marriage of a woman who, while married, had made a will, to operate to revoke it, it would have said so. A provision of this kind is found in the wills act of England, 1 Vict., chap. 26, §18, which is in these words: "Every will made by a man or woman shall be revoked by his or her marriage."

It is further to be observed that §2732 Burns 1901 was taken from the New York statute of wills, and that the New York statute has been held by the courts of that state not to apply to a will made by a woman who, at the time, was married, although she might afterwards have been divorced, or have become a widow, and married a second time. As this clause is taken from the statute of another state, it will be deemed to have the meaning given it by the courts of that state. *City of Laporte v. Gamewell, etc., Co.*, 146 Ind. 466, 35 L. R. A. 686, 58 Am. St. 359.

In re McLarney, 153 N. Y. 416, 47 N. E. 817, 60 Am. St. 664 and note, it was said by O'Brien, J.: "The statute provides that 'a will executed by an unmarried woman shall be deemed revoked by her subsequent marriage.' §44. The deceased was not an unmarried woman when she made the will. She was a married woman who

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subsequently became a widow and remarried. The case is not, therefore, within the rule or the reason of the rule that the will of an unmarried female is revoked by her subsequent marriage." See, also, *In re Burton's Will*, 25 N. Y. Supp. 824, and *In re Comassi*, 107 Cal. 1, 40 Pac. 15, 28 L. R. A. 414.

The whole subject of the right to make a will, the mode of its execution and attestation, and the manner in which it may be revoked, are matters of statutory regulation. The legislature has the power to designate the class of persons who may make a will, and to declare what changes in the personal status of such persons after its execution shall operate as a revocation of the will. In this State married women have been declared competent to make wills, and only in the case of a will executed by a woman who was unmarried at the time of making it, is it provided that a subsequent marriage shall operate to revoke it. As Mrs. Anna L. Bickle was not an unmarried woman when she made the will of April 4, 1865, by which she devised all her estate to the appellee Irene W. Trask, her subsequent marriage to William A. Bickle can not be deemed to have revoked the will so made.

The supposed agreement between Bickle and his wife that, in consideration of his intestacy, she would, by her own will, provide for his sisters, could not operate to revoke the will of Mrs. Bickle. The most that could be claimed for such an agreement, if valid and enforceable, would be that it created a charge upon the property inherited by the wife from the husband in favor of the kindred for whom she had failed to make provision. It does not appear from the reply whether Bickle's sisters are living or dead, or that the appellant had any interest in the provision alleged to have been intended for them.

There is nothing in the point that the court erred in rendering a judgment in favor of the appellee Trask upon the pleadings when the demurrer to the reply of the appel-

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lant was sustained. They stood thus: To the complaint a general denial was filed by the appellee Trask, and a special answer to the whole complaint stating facts which barred any recovery upon it. To this answer a reply was filed by way of confession and avoidance, which was insufficient, and to which a demurrer was sustained. The appellant thereupon expressly refused to plead further, and elected to stand upon his demurrer. The answer, therefore, remained without traverse, and stood confessed by the plaintiff and appellant. In these circumstances it was the duty of the court to render a judgment for the defendant and appellee Trask. §386 Burns 1901; *Adams v. Tuley*, 1 Ind. App. 490; *Clearwater v. Meredith*, 1 Wall. 25, 43, 17 L. Ed. 604.

Finding no error in the record, the judgment is affirmed.

CUSTER ET AL. v. HOLLER, ADMINISTRATOR, ET AL.

160	505
f166	321
f166	521

[No. 20,029. Filed May 1, 1903.]

EXECUTORS AND ADMINISTRATORS.—Sales of Real Estate.—Time of Return.—The provision of §2512 Burns 1901, that in sales of real estate for the payment of debts the administrator shall make return under oath of his proceedings in the premises, at the next term after such sale, is directory merely as to the time, and such sale is not invalid because all of the proceedings were had at the same term of court.

From St. Joseph Circuit Court; *W. A. Funk*, Judge.

Petition by Mary E. Custer and another to vacate a sale of real estate made by Christian Holler, administrator of the estate of Sarah Ranstead, deceased. From the action of the court in sustaining a motion to quash the petition, petitioners appeal. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed*.

B. F. Shively and *H. R. Wair*, for appellants.

Andrew Anderson, *James DuShane* and *W. G. Crabill*, for appellees.

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HADLEY, C. J.—This record discloses that appellee Holler, as administrator of the estate of Sarah Ranstead, deceased, was, at the February term, to wit, February 5, 1901, by the circuit court, upon a proper petition and notice, granted an order to sell, at private sale, real estate to pay the debts of the decedent. Appellants are daughters and heirs of the decedent. After giving the notice of sale fixed by the court, the administrator, on the 19th day of February, sold the land to the appellee Grand Trunk Railway Company for \$3,800 cash, it being the highest bidder, and that sum being more than the appraised value. Two days later, to wit, February 21, 1901, the administrator reported the sale to the court, which report was approved, the sale confirmed, and a deed of conveyance executed, approved, and delivered to the purchaser. Or, more concretely stated, the order of sale, the sale, the report of the sale, the confirmation of the sale, and the execution and delivery of the deed of conveyance to the purchaser all took place at the same term of court. At the next term of the court, to wit, in May, appellants filed objections to the sale, in the form of a verified petition and motion, that the confirmation and sale be vacated, and the property put to resale, because a purchaser had been found who would pay \$4,250 for the land; that sum being ten per cent. more than the sum paid for the land exclusive of the cost and expenses of sale. Notice of the pendency of such motion was served upon the administrator and the purchaser. At the hearing, appellee railway company's motion to strike out and quash appellants' motion to vacate was sustained, which action of the court is brought here for review under a proper assignment of error.

Appellants contend that the court had no power to act upon the report of sale within the limits of the term at which the order was made, relying upon §2512 Burns 1901, which provides: "Such executor or administrator shall make return, under oath, of his proceedings in the

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premises, at the next term after such sale, to the court granting the order; and if such court be satisfied therewith, it shall confirm the same, and direct such executor or administrator to execute a conveyance to such purchaser."

The argument is that the time for the report of sale is stated in language so plain and unambiguous as to make it conclusive that the legislature intended the words "at the next term after the sale" as mandatory, and that the report should not come up for action, or the sale for confirmation or rejection, until the term next following that at which the order is made; thus giving the heirs time and opportunity to scrutinize the sale, and determine whether it has been fair and the price adequate.

On the other hand, appellees claim that, since there are no negative words used in the statute forbidding the court to consider the report and sale at some other time than the next following term, it must be regarded as directory only, and that if a report is approved and sale confirmed before or at a later term it is but an irregularity which of itself will not vitiate the sale. We are unable to find either reason or authority in support of appellants' position. When time is not of the essence or substance of the thing to be done,—when it may be as well done at some other time, and more convenient and beneficial to the parties interested,—there can be no sound reason, in most instances, why the law should prevent the highest interests of the parties concerned from being subserved by a reasonable departure from the advice and direction of the statute as to the time for the performance of some official act. The courts generally take this view. Beyond question it is well established in this State as a rule of construction that when a statute fixes the time for the performance of an official act that affects the rights and duties of others, without words of limitation upon the right or power of the officer to perform the act at some other time, the time so fixed will be regarded as directory, and not as essential to the validity

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of the proceeding. *Nave v. King*, 27 Ind. 356; *Jones v. Swift*, 94 Ind. 516, 523, and cases there collated; *Gallup v. Schmidt*, 154 Ind. 196, 204; *Landes v. State, ex rel., ante*, 479. In the *Jones* case the following is approvingly quoted from Sedgwick, Stat. & Const. Law, 316: "When statutes direct certain proceedings to be done in a certain way or at a certain time, and a strict compliance with these provisions of time and form does not appear essential to the judicial mind, the proceedings are held valid, though the command of the statute is disregarded or disobeyed."

The contention of appellants as to the purpose of the legislature in requiring the report to be made at the term following the one at which the order was made does not appeal to us with force, for it would be completely within the power of a designing administrator so to arrange his sale that it would occur but a day or two before the opening of the next term, and thus avoid giving time for investigation by the heirs.

In this case there is no denial of the necessity to sell the land for the payment of debts; the parties were all before the court; no claim of fraud or injustice in the appraisal; no charge of negligence or unfairness in the sale, or in any other step of the proceeding; the whole matter was open, fair, and regular; the purchaser was the highest bidder, and purchased in good faith for more than the appraised value, and paid the full amount of his bid in cash. These things perhaps supplied reasons for the court to deem it proper and expedient to approve the report and confirm the sale at the time it was done, rather than keep the matter open, and the estate pending for three months for final action.

It is manifest from §2520 Burns 1901, that the legislature had in contemplation that the procedure prescribed for the sale of lands to pay debts would, for one cause or another, sometimes be departed from, and did, therefore, specifically provide what provisions of the statute should,

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in such cases, be deemed essential to the validity of a sale, and what should not avoid it; or, in other words, what provisions of the statute shall be held as mandatory and what as directory. Said section is as follows: "No sale of any real estate, made by an executor, administrator, or guardian, shall be avoided on account of any irregularity or defect in the proceedings, if it shall appear—(1) That the sale was authorized by the court having jurisdiction of the parties and the subject-matter. (2) That the executor, administrator, or guardian gave bond, as required by law, or has accounted for the proceeds of such sale. (3) That notice of the time and place of sale was given in the manner provided by law. (4) That the premises were sold accordingly, and are held by or under one who purchased them in good faith."

The postponement of the report and confirmation of the sale to the next term thereafter, is not found among the essential requirements of the statute as determined by the lawmakers themselves, and we can not hold as peremptory or essential that which the legislature has declared shall not be so regarded. It is the duty of the trial court, in all cases, to obey the statutes, whether mandatory or directory; yet under the law and facts of this case we are constrained to hold that the premature action of the court was but an irregularity that became cured by the confirmation of the sale and order to deliver possession and deed to the purchaser. *Henry v. McKerlie*, 78 Mo. 416, 428.

Judgment affirmed.

WHITSON v. THE STATE.

[No. 20,085. Filed May 12, 1908.]

CRIMINAL LAW.—*Indictment.*—*Petit Larceny.*—*Description of Property Stolen.*—An indictment for petit larceny describing the property stolen as "five dollars of the personal goods and chattels of," etc., is insufficient at common law, and is bad under §1819 Burns 1901, for failure to show that the property stolen consisted of five dollars in money.

From Washington Circuit Court; *T. B. Buskirk*, Judge.

James Whitson was convicted of petit larceny, and appeals. *Reversed.*

S. H. Mitchell and *E. C. Mitchell*, for appellant.

C. W. Miller, Attorney-General, *W. C. Geake* and *C. C. Hadley*, for State.

JORDAN, J. — Appellant, together with others, was charged by indictment with having committed the crime of petit larceny. A motion to quash the indictment was denied, and upon his plea of "not guilty" he was separately tried by the court, and convicted of the crime as charged. It was further found that he was of the age of twelve years, and, over his motions in arrest of judgment and for a new trial, the court rendered its judgment, committing him to the Indiana Reform School for Boys, there to remain until he had attained the age of twenty-one years, unless sooner discharged by the board of control. From this judgment he appeals, and bases the errors assigned upon the ruling of the court in denying each of the aforesaid motions.

The indictment charges that appellant and the other persons therein named, at Washington county, in the State of Indiana, on the 15th day of April, 1902, "did then and there feloniously steal, take, and carry away five dollars of the personal goods and chattels of Charles Mobley, then and the value of five dollars, contrary," etc. Counsel for appel-

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lant contend that describing the property stolen simply as "five dollars of the personal goods and chattels," etc., is too indefinite or uncertain, and therefore the pleading, for this reason alone, is insufficient, and that the motion to quash ought to have been sustained.

It is settled beyond controversy that charging generally a defendant accused of the crime of larceny with having stolen the goods and chattels of the person mentioned, without giving a more specific description of the property stolen than that afforded by the words "goods and chattels," is insufficient. Prior to the enactment of §1819 Burns 1901, §1750 Horner 1901, being §176 of the criminal code of 1881, it was equally well settled by the decisions of this court that an indictment or information charging the larceny of money was not sufficient if only the aggregate amount thereof was stated, without any specification whatever of the kind or denomination of the money alleged to have been stolen, unless the pleading disclosed some legal excuse for the failure to give a more specific or proper description. *State v. Hoke*, 84 Ind. 137; *Arnold v. State*, 52 Ind. 281, 21 Am. Rep. 175, and cases there cited.

In *State v. Hoke*, *supra*, which was a prosecution upon a charge of larceny, this court, in considering the sufficiency of the several counts of the indictment, said: "The third count of the indictment is bad, for the reason that it does not contain a description of the property charged to have been stolen. It was not sufficient, under the code of 1852, to charge that 'six thousand and twenty-seven dollars of the paper money of the United States' were stolen. Some description must be given of the bills or notes, or some legal excuse must be shown for a failure to give the proper description."

In *Arnold v. State*, *supra*, the court said: "Money should be described as so many pieces of current gold or silver coin, and the coin must be stated by its appropriate name."

Since the enactment of §1819, *supra*, the rule of the com-

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mon law in regard to the particularity or precision in respect to charging the larceny of money has been modified, as, by the provisions of this statute, in every indictment or information wherein it is necessary to make any averment as to any money, bank bills, or United States treasury notes, etc., it will be sufficient to "describe such money, bills, notes, or currency simply as money, without specifying any particular coin, note, bill, or currency; and such allegation shall be sustained by proof of any amount of coin or of any such note, bill, or currency, although the particular species of coin of which such amount was composed or the particular nature of such note, bill, or currency be not proved." Consequently, by virtue of the above section, this court has repeatedly affirmed and sustained the sufficiency of an indictment for the crime of larceny which merely described the stolen property to be a certain number of dollars in money of the "value," etc., without specifying any particular coin, note, bill, or currency. *Randall v. State*, 132 Ind. 539; *Hammond v. State*, 121 Ind. 512; *Rains v. State*, 137 Ind. 83.

It will be observed, however, that the indictment in the case at bar was not drafted so as to bring it within the provisions of the above section of our criminal code, for in no manner is it alleged or shown therein that the property stolen consisted of five dollars in money. Therefore the pleading can not be upheld under the decision in *Randall v. State*, *supra*, or by any of the other cases last above cited, but the sufficiency of the description of the property must be tested by the rules of the common law as recognized and enforced by this court in cases arising before the taking effect of the criminal code of 1881.

In *Arnold v. State*, *supra*, which was a prosecution for robbery, the court held the indictment bad, for the reason that it described the property alleged to have been taken as national bank notes and United States treasury notes, known as greenbacks, without giving the denominations

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of the bills, or otherwise showing that they represented certain sums of money. Among the authorities cited by the court in that appeal, in support of its holding, are the following: *State v. Longbottoms*, 11 Humph. 39, where it was held that an indictment charging the accused with having stolen "ten dollars good and lawful money of the state of Tennessee," was not a sufficient description of the property stolen. *People v. Ball*, 14 Cal. 101, 73 Am. Dec. 631, where the court also held that describing the stolen money as "three thousand dollars lawful money of the United States" was not sufficient. In *Merwin v. People*, 26 Mich. 298, the information charged that the defendant "did feloniously steal, etc., one hundred and thirty-five dollars" of the goods and chattels of the person therein named. This description of the stolen property in that case was held bad for uncertainty. The state of Michigan also had a statute substantially like §1819, *supra*, and the court in the case cited held that, inasmuch as the information had not been drafted or framed in compliance with the provisions thereof, the sufficiency of the description of the stolen property must be tested by the rules of the common law applicable to an indictment for larceny. In *Barton v. State*, 29 Ark. 68, the indictment described the property alleged to have been stolen as "one hundred and thirty dollars." This description was held bad, and in passing upon the sufficiency thereof the court, in that appeal, among other things, said: "Whether the subject of the larceny was coin, United States treasury notes, or bank notes, is not alleged. If the term 'dollars' may be said to have a legal meaning and to import the national coin, * * * we are left to conjecture what kind of coin the appellant was charged with stealing." In further support of the proposition that the indictment in controversy is bad, see Gillett, *Crim. Law* (2d ed.), §138, and 2 Bishop, *Crim. Proc.* (4th ed.), §703, and cases cited.

Whether the five dollars charged to have been stolen by
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appellant consisted in whole or in part of any coin, notes, or bills, current money of the United States, or any other country, is, under the averments of the indictment in question, left wholly to be surmised. It would have been quite easy for the pleader to have properly described the property in controversy, had he employed, in addition to the words "five dollars" the phrase "in money," or "of the money," etc., as authorized by §1819, *supra*. This he neglected to do. Consequently the statute, under the circumstances, can not be invoked to sustain the description, and it certainly will not suffice when judged by the rules of the common law, as applied and enforced in this jurisdiction prior to the passage of the statute.

The averment in respect to the subject of the theft can not be said to be so distinct or definite as to serve to apprise the accused of the nature or character of the evidence which the State intended to introduce at the trial to prove the accusation. Again, what information for his protection in the future would a judgment of conviction or acquittal upon such an indictment afford him? In regard to the certainty required in criminal pleading, see *Funk v. State*, 149 Ind. 338, and cases there cited; *Campbell v. State*, 154 Ind. 309.

We have been unable to discover any authority which, under criminal pleading at common law, can be said to sustain the indictment in dispute, in the absence of alleging some legitimate excuse for the lack of more particularity.

It is also insisted that the evidence does not sustain the conviction, but as the judgment must be reversed because of the error of the court in overruling the motion to quash, we therefore intimate no opinion in regard to the evidence.

The judgment is reversed, and the cause remanded, with instructions to the lower court to sustain the motion to quash the indictment.

MAXWELL v. WRIGHT ET AL.

160	515
1169	534

[No. 20,117. Filed May 12, 1903.]

TRIAL.—*Defective General or Special Verdict.*—*Remedy.*—Where a special verdict or special finding is defective, because there is not a finding of all the matters in issue, or a finding of facts to exist which were not proved, the remedy is by motion for a new trial; but this rule is not applicable to general verdicts. p. 518.

SAME.—*Defective Verdict.*—*Venire de Novo.*—Where, on an issue as to the execution of a note by two defendants, there was a general verdict for one of the defendants, such verdict was defective as not being responsive to the whole case, and a *venire de novo* should be awarded as to both defendants. pp. 516-521.

From Steuben Circuit Court; *E. D. Hartman*, Judge.

Action by William H. Maxwell against Henry Wright and others. From a judgment for defendants, plaintiff appeals. Transferred from Appellate Court, under clause 2, §1387j Burns 1901. *Reversed.*

Willis Rhoads and *E. D. Salsbury*, for appellant.

D. R. Best, *E. A. Bratton*, *C. A. Yotter*, *W. G. Croxton* and *F. M. Powers*, for appellant.

HADLEY, C. J.—This action was commenced by appellant on a promissory note executed by appellees. Appellees, Henry Wright and Cyrus Wright, filed separate verified answers denying the execution of the note. Appellee Monroe Wright was defaulted. Appellant filed separate replies to the answers of Henry and Cyrus Wright. The replies filed by appellant to the separate answers of appellees, Henry and Cyrus Wright, were identical. They alleged the execution of the note in suit; that appellees were brothers; that it was a common occurrence, and well known, that appellees were accustomed to sign notes for and with each other; that the appellee Monroe Wright was the principal of said note; that when the note became due appellant notified each of the appellees separately that he expected the note to be promptly paid, and each of the notices was

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received by the party for whom it was intended; that appellees, Henry and Cyrus Wright, well knew that the note was a forgery, and failed to notify appellant; that the appellant relied upon said appellees, and refrained from taking steps to collect the amount of said note, which he could have done had he known at the time that it was a forgery; that at that time Monroe Wright, the principal in said note, had the means to pay the same, but that he afterward disposed of his property and secretly left the State; that the appellees, Henry and Cyrus Wright, assisted their said brother Monroe to leave the State, and after he had so left, they then made known to the appellant that the note was a forgery. The separate demurrer of Henry and Cyrus Wright to appellant's reply was overruled. The cause was tried by a jury and a general verdict returned, which, omitting the caption and signature, was as follows: "We the jury find for the defendant Henry Wright." Appellant filed a motion for a *venire de novo*, which motion was overruled by the court as to the defendant Henry Wright and sustained as to the appellees Cyrus and Monroe Wright, and a *venire de novo* was by the court ordered as to the last named appellees.

Upon a proper assignment, appellant urges that his motion for a *venire de novo* should have been sustained as to all of the defendants, and his whole case again put upon trial. For many years the rule of the common law, as stated in 2 Tidd's Prac., 922, and affirmed and followed in *Bosseker v. Cramer*, 18 Ind. 44, 47, and in a great many other cases before and after the *Bosseker* case, was, in this State, the recognized rule relating to the office of a *venire de novo*. The rule as there stated is this: "A *venire de novo* is granted when the verdict, whether general or special, is imperfect by reason of some uncertainty or ambiguity, or by finding less than the whole matter put in issue, or by not assessing damages." The introduction of our practice code in 1852 seems to have had no effect upon the applica-

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tion of the rule until this court's attention was, in 1879, in *Graham v. State, ex rel.*, 66 Ind. 386, 394, drawn to what are now §§554, 560 Burns 1901. Section 554 provides that "A special verdict is that by which the jury find the facts only, leaving the judgment thereon to the court." Section 560 enacts that "Upon trials of questions of fact by the court, it shall not be necessary for the court to state its finding, except generally for the plaintiff, or defendant, unless one of the parties request it, with a view of excepting to the decision of the court upon the questions of law involved in the trial, in which case the court shall first state the facts in writing, and then the conclusions of law upon them, and judgment shall be entered accordingly."

In the well reasoned opinion in the *Graham* case the court holds in effect that the old rule is not applicable to special verdicts and special findings under the above sections of our code, if such verdict or finding has in it substance enough to form the basis of a judgment for either party. The reason is this: In the one case the only province of the jury is to find all the proved—not the unproved—facts. In the other, the court must find all the facts within the issues that have been established by the evidence, and should leave unstated all the issuable facts not proved by the party assuming to do so. The only difference in the two cases is that in the former the court must apply the law to the facts as they exist by the verdict of the jury, which he may do without disclosing his views, and in the latter he must state in writing what he conceives the law to be as applicable to the facts he has found proved, with a view of enabling the losing party to challenge the soundness by appeal, and judgment shall be rendered accordingly. In both cases it must be assumed that all the facts the parties were able to prove are stated, and that all absent facts were left unstated, because unproved, and the verdict is not, therefore, defective. Hence the rule that all issues and material facts not found in a special finding or special

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verdict will be adjudged against the party who had the burden of proving them. *Glantz v. City of South Bend*, 106 Ind. 305; *Pittsburgh, etc., R. Co. v. O'Brien*, 142 Ind. 218, 222.

Special verdicts or special findings thus arrived at are fair upon their face, and reveal no infirmity; and if mistakes have been made by finding less than all the matters in issue, or in finding facts to exist that were not proved, these are matters extrinsic the record, and the remedy is by motion for a new trial, and not by *venire de novo*. *Indiana, etc., R. Co. v. Finnell*, 116 Ind. 414, 420; *Citizens Bank v. Bolen*, 121 Ind. 301, 304.

Where, however, a special verdict or finding shows that the evidentiary facts, and not the ultimate facts, have been found, and it appears that such evidentiary facts are sufficient to establish the ultimate facts alleged in the complaint, such a verdict or finding shows upon its face that it is defective for failure to find the facts set forth in the complaint, proved, and a *venire de novo* should be ordered. *Boyer v. Robertson*, 144 Ind. 604, 607, and cases cited; *Craver v. Carver*, 83 Ind. 368; *Locke v. Merchants Nat. Bank*, 66 Ind. 353.

The reasons that called for a modification of the old rule as to special verdicts and findings do not apply to general verdicts. In the former it is not the province of the jury to determine which party shall prevail in the action. That is left to the court; while in the general verdict the jury is required, under the instructions of the court as to the law of the case, to find generally from the facts proved and unproved, whether the plaintiff or defendant has succeeded on the issues made by the pleadings. Hence, when the jury fails to find for the plaintiff or defendant on an issue between the parties, it is apparent from the verdict that the jury has stopped short of a full determination of the case, and the verdict is therefore ill and defective, and subject to a *venire de novo*. *Crouch v. Martin*, 3 Blackf. 256; *Wright*

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v. *State, ex rel.*, 8 Blackf. 385; *Bosseker v. Cramer*, 18 Ind. 44; *Jenkins v. Parkhill*, 25 Ind. 473, 475; *Whitworth v. Ballard*, 56 Ind. 279, and cases cited; *Leeds v. Boyer*, 59 Ind. 289.

Furthermore, a general verdict or finding is arrived at by a finding, from the whole evidence, that the facts essential to a recovery have been proved or have not been proved, and the verdict or finding is the result of the deductions and inferences of fact drawn from a consideration of all the evidence; hence the rule that all reasonable presumptions and intendments must be indulged in support of such verdict or finding. *Central Union Tel. Co. v. Fehring*, 146 Ind. 189, 193.

In this case the issues joined involved the execution by Henry and Cyrus Wright of the note sued on. Its execution was affirmed by the plaintiff, and denied by each of these defendants. These issues were submitted to the jury as parts of a single trial. The plaintiff was entitled to have both determined, and the trial was incomplete without it. So, when the verdict was returned showing upon its face that there had been no finding either for the plaintiff or defendant on the issue made by Cyrus Wright, the verdict was bad, because not broad enough to cover the case tried, and therefore inadequate as a basis for a judgment either for or against the plaintiff or both defendants upon the whole case.

As against the plaintiff, we can not approve the contention that the verdict was good and effective as to Henry Wright, because full and complete as to him. The court could not require the plaintiff to try his case by piecemeal. When he had given his evidence, and the defendants had given theirs on both issues, the plaintiff had a right to a finding as broad as the evidence. It is not certain that the jury would have returned the same verdict as to Henry Wright if they had been required to pronounce at the same time upon the issue made by Cyrus Wright. And the ver-

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dict being defective for not being responsive to the whole case, it must be held ineffective for any part of it, and therefore a nullity. *Peed v. Brenneman*, 72 Ind. 288; *Ridenour v. Beekman*, 68 Ind. 236, 238. In this last case the court quotes approvingly from 1 *Graham & Waterman*, New Trials, 140, the following: "If the jury find only a part of the issues, judgment can not be entered on the verdict. It is void for the whole, and a *venire de novo* will be awarded." It follows that the court erred in overruling appellant's motion for a *venire de novo* as to all the defendants.

While there is no real conflict among our many cases upon this subject, there is apparently some confusion, manifestly the result of a careless use of language employed in making general statements concerning the office of a *venire de novo*. In all the cases we have examined, decided since the case of *Graham v. State, ex rel.*, 66 Ind. 386, which rests upon a special verdict, or special finding, this case has been uniformly followed in all decisions involving a special verdict or special finding—and in effect holding, that if the special verdict or finding leaves some issue or material fact undetermined, such issue or fact will be regarded as not proved by the party having the burden of proof—and, if such verdict or finding contains substance enough to support a judgment one way or the other, it will not be objectionable because it does not pass upon all the issues, and the remedy for mistakes and errors not appearing upon the face of the verdict or finding is by motion for a new trial, and not by a *venire de novo*. Among the many cases that might be cited from this and the Appellate Court, see *Glantz v. City of South Bend*, 106 Ind. 305, 308; *Bartley v. Phillips*, 114 Ind. 189; *Indiana, etc., R. Co. v. Finnell*, 116 Ind. 414, 420; *Board, etc., v. Pearson*, 120 Ind. 426, 430, 16 Am. St. 325; *Evansville, etc., R. Co. v. Maddux*, 134 Ind. 571, 579; *Louisville, etc., R. Co. v.*

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Berkey, 136 Ind. 181, 191; *Heiney v. Lontz*, 147 Ind. 417; *Zimmerman v. Gaumer*, 152 Ind. 552.

And in all cases since the *Graham* case, brought to our attention, involving a general verdict or finding which showed upon its face that less than the whole issue was covered, or was so ambiguous and uncertain as to afford no foundation for a judgment, a *venire de novo* has been held to be the proper remedy. Among the cases, see *Ridenour v. Beekman*, 68 Ind. 236; *Clark v. Brown*, 70 Ind. 405; *Brickley v. Weghorn*, 71 Ind. 497; *Peed v. Brenneman*, 72 Ind. 288, 290; *Ridenour v. Miller*, 83 Ind. 208; *Bunnell v. Bunnell*, 93 Ind. 595; *Baughan v. Baughan*, 114 Ind. 73; *Bohr v. Neuenschwander*, 120 Ind. 449, 456; *American White Bronze Co. v. Clark*, 123 Ind. 230, 232.

So it must be held that the rule springing from *Graham v. State, ex rel.*, *supra*, which must now be considered as firmly established in this State, modifies the common law rule with respect to the writ of *venire de novo*, only in its application to special verdicts and special findings as ruled by our civil code.

Judgment reversed, with instructions to sustain appellant's motion for a *venire de novo*.

BULLOCK v. ROBERTSON ET AL.

[No. 19,912. Filed October 28, 1902. Rehearing denied May 12, 1903.]

PARENT AND CHILD.—*Custody*.—*Habeas Corpus*.—In a suit for the custody of a child, whether between the father and mother, or either of them, and third persons, the welfare of the child is paramount to the claim of either parent, and the order of court should be made with regard to the best interests of the child. p. 522.

SAME.—*Custody*.—*Habeas Corpus*.—*Appeal and Error*.—Where the custody of an infant in a *habeas corpus* proceeding is awarded by the court upon the evidence, such judgment will not be reversed upon rulings which merely go to the sufficiency of the return. pp. 523, 524.

190	521
163	188
160	521
165	330
165	407

Bullock v. Robertson.

From the Superior Court of Marion County; *J. L. McMaster*, Judge.

Habeas corpus proceeding by Henry W. Bullock against William Robertson and others to obtain possession of a child. From a judgment in favor of defendants, plaintiff appeals. *Affirmed.*

Frank McCray and *G. W. Spahr*, for appellant.

W. T. Brown, for appellees.

MONKS, J.—This was a *habeas corpus* proceeding brought by appellant against his wife, Jessie R. Bullock, and his wife's father and mother, William and Roxana Robertson, to obtain the possession of an infant child of appellant and said Jessie, aged four years. Appellees William and Roxana Robertson filed a return to said writ, and Jessie R. Bullock filed a separate return. Appellant filed exceptions to said returns which were overruled by the court. A hearing of said cause resulted in a judgment awarding the custody of said child to appellee Jessie R. Bullock.

Appellant insists that the action of the court in overruling his exceptions to said returns was erroneous. It is settled law in this State that where there is a controversy in a *habeas corpus* proceeding, or in a suit in equity, for the custody of a child, whether between the father and mother, or between them, or either of them, and third persons, the welfare of the child is paramount to the claim of either parent, and the order of the court should in all such cases be made with regard to the best interests of the child. It is reasonable and just that the courts should have this power for the benefit of the infants. Their custody should not depend upon the accident of possession. The real question is to whom should they be entrusted for their own good and that of society. *Palin v. Voliva*, 158 Ind. 380; *Leibold v. Leibold*, 158 Ind. 60; *Berkshire v. Caley*, 157 Ind. 1, 8, and cases cited; *Schleuter v. Canatsy*, 148 Ind. 384, 388,

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and cases cited; *Hussey v. Whiting*, 145 Ind. 580, 582; *McShan v. McShan*, 56 Miss. 413; Hochheimer, Custody of Infants (3d ed.), §§42, 43, 46-49; Church, Habeas Corpus (2d ed.), §§425, 437c, 439-443; Hurd, Habeas Corpus (2d ed.), 473 *et seq.*; 15 Am. & Eng. Ency. Law (2d ed.), 185-187; 17 Am. & Eng. Ency. Law, 365-371.

Under the rule established in this State, and by the authorities cited, the father is not entitled, as a matter of course, to an order, on the return to a writ of *habeas corpus*, that the mother or other person in possession of the child shall deliver it to him; but the courts will exercise a sound discretion for the benefit of the child, in disposing of its custody.

When an infant is brought into court in obedience to a writ of *habeas corpus*, it is in the custody of the court, subject to its disposition, and this power rests upon the broad foundation of the general jurisdiction of the court over infants. The power of the court over infants thus before it is not limited to orders as to custody.

The superior court of Marion county has jurisdiction of all suits in equity, and, therefore, has the power to control the person and custody of infants except when the statute provides otherwise. *Leibold v. Leibold*, *supra*, and authorities cited.

In this case, the court, after hearing the evidence, awarded the custody of said child to the mother, Jessie R. Bullock. Said child was in the custody of the court, and was subject to its jurisdiction. The power of the court, under such circumstances, to award its custody to either parent or to a third party in said proceeding, as its welfare and best interests required, was full and complete, and did not depend on the technical sufficiency of the returns; nor was such power limited or controlled by the allegations thereof.

It follows, that in such a case as the one in hand, where custody is awarded by the court upon the evidence, such

judgment will not be reversed upon rulings which merely go to the sufficiency of the return. The evidence is not before us, nor has any attempt been made to bring it into the record.

Judgment affirmed.

GUY ET AL. v. LIBERENZ ET AL.

[No. 19,972. Filed November 5, 1902. Rehearing denied May 12, 1903.]

HUSBAND AND WIFE.—Principal and Surety.—Mortgages.—Tenants by Entireties.—In a suit on a note executed by a husband and wife, secured by mortgage on real estate held by them as tenants by the entireties, there is no presumption that the consideration was not used for the benefit of the real estate so held by them, or that the wife is surety on said obligation, but the burden is upon her to allege and prove facts showing that she executed the note and mortgage as surety, and not as principal. *p. 528.*

SAME.—Principal and Surety.—Bills and Notes.—Whether a married woman is principal or surety on a promissory note, or other obligation, is determined, not from the form of the contract, nor from the basis upon which the transaction was had, but from the inquiry as to whether she received in person or in benefit to her estate the consideration upon which the contract depends. *p. 528.*

SAME.—Principal and Surety.—Bills and Notes.—Mortgages.—Consideration.—A finding in a suit to foreclose a mortgage for \$1,000, executed by a husband and wife on real estate held by them as tenants by entireties, that the consideration for the note and mortgage sued upon was used to pay the individual indebtedness of the husband, and to enable him to perform a contract to erect a certain livery barn, and that no part of the consideration was received by the wife, nor expended in the betterment of her real estate, or real estate held by them as tenants by entireties, shows that the wife executed the mortgage as surety only, and that the same is invalid as to her; and the fact that the livery barn on which the proceeds of the loan were expended was taken by the husband and afterward conveyed to the wife and sold by her for \$800 in excess of all liens thereon, did not change the relation of the parties, it not being shown that she agreed, in consideration of the conveyance to her of the real estate upon which the barn was built, or for any other consideration, to pay the note and mortgage sued upon. *pp. 529-532*

180 524
183 579

180 524
186 650

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HUSBAND AND WIFE.—*Estoppel.*—*Mortgage Deduction Law.*—*Affidavit.*—

A married woman will not be estopped from denying the validity of a mortgage on the ground of suretyship by the fact that she joined with her husband in an affidavit and obtained a reduction of taxes under the mortgage deduction law on the mortgaged real estate by reason of such mortgage. *p. 532.*

From DeKalb Circuit Court; *E. A. Bratton*, Special Judge.

Suit by William J. Guy and wife against William Liberenz and wife to foreclose a mortgage. From a judgment for defendants, plaintiffs appeal. Transferred from Appellate Court, under clause 2, §1337j Burns 1901. *Affirmed.*

C. H. Bruce, F. S. Roby, S. A. Wood, E. D. Salsbury and *S. A. Harper*, for appellants.

J. E. Rose and *J. H. Rose*, for appellees.

MONKS, J.—Appellants brought this action against appellees on a promissory note secured by a mortgage executed by appellees. A special finding of facts was made by the court, and conclusions of law stated thereon. Over a motion for a new trial by appellants, a judgment in accordance with the conclusions of law was rendered. That the court erred in each of the conclusions of law is the only error assigned and not waived.

It appears from the special finding that appellee William Liberenz, on November 24, 1896, contracted, on his individual account, with Yount & Yount, to erect a livery barn for them on a lot for which they held a contract for a deed on the payment of \$270, the balance of the purchase money. The contract price for the erection of said barn was \$1,850. Liberenz began the erection of the barn, but, needing money to complete the same, borrowed \$1,000 of appellants, \$800 of which was to be used in completing said barn under said contract, for which he and his wife executed the note sued upon, and to secure the same executed the mortgage on real estate owned by them as tenants by the entireties. The

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money was delivered to the husband after the note and mortgage were executed. The said husband used about \$800 of said borrowed money in the construction of said barn, under his contract with Yount & Yount, and the remainder thereof he used in the payment of his individual debts. Louisa Liberenz, the wife, did not negotiate said loan, nor did she see appellants in reference thereto until the execution of said mortgage. No statement was made in her presence to appellants, or either of them, as to the purpose for which said money was borrowed, nor as to what was to be done with the same. "No part of said \$1,000 was received by the said Louisa, nor was any part thereof expended in the betterment of said real estate described in said mortgage, nor any other real estate then owned by her or in which she had any interest, and that she did not receive the consideration for which said note and mortgage were executed, except as herein set out." Said William Liberenz, after the completion of said barn, no part of the contract price having been paid, took a mechanic's lien thereon for \$1,850. On the 18th day of October, 1897, said Yount & Yount, being unable to pay said Liberenz for the erection of said barn, on his request, and in payment of said mechanic's lien, assigned the written contract they had for said real estate to one Charles Kent, by a written assignment on the back of said contract.

At the time said contract was assigned to said Kent, he was surety for said William Liberenz to various persons for about \$1,200, the individual indebtedness of said William Liberenz; and, in consideration of said assignment of said contract, said Kent promised and agreed to pay the same. The said livery barn was at said time encumbered by liens other than the lien of said William Liberenz, amounting to \$690, and the lien for unpaid purchase money for \$270—in all \$960—and the said property was at this time of the fair value of \$1,300. After the assignment of said contract to said Kent, he became dissatisfied with said

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contract with said William Liberenz for the payment of said \$1,200 for which he was surety; and thereupon said William Liberenz, his wife joining therein, conveyed to said Kent another piece of real estate, of the fair value of \$2,500, which said William Liberenz owned in his own right, the same being encumbered by a mortgage for \$1,250 executed by him; and the said Kent assigned to said Louisa Liberenz all his right, title, and interest in the contract assigned to him by said Yount & Yount. Said Kent and wife on said 18th day of October, 1897, executed a quit-claim deed for said real estate upon which said barn was built to said Louisa Liberenz; and she on November 13, 1897, received a deed therefor under the contract assigned to her by said Kent. On said 18th day of October, 1897, said Kent paid said Yount & Yount \$100, and said William Liberenz paid them \$6, as a further consideration for the assignment of said contract to said Kent. Afterwards said Louisa Liberenz sold and conveyed said barn, and the real estate upon which the same was built, for \$1,000 over and above all claims and liens against the same, \$400 of which she received in cash, and \$600 in mortgage notes. After appellees had learned that said mortgage could not be enforced, on account of being the note and mortgage of a married woman, they made an affidavit under the act of 1899 (Acts 1899, pp. 422, 423, §8417a *et seq.* Burns 1901, §6272a *et seq.* Horner 1901), and filed the same in the office of the auditor of DeKalb county, and obtained a deduction of \$700 from the assessed value of the real estate described in the mortgage sued upon.

The court stated thereon the following conclusions of law: "(1) That the defendant Louisa Liberenz is not liable upon the note and mortgage sued on in the plaintiffs' complaint, and set out in the findings of facts herein; (2) that the defendant Louisa Liberenz signed the note and mortgage sued on in the plaintiffs' complaint as surety for her husband William Liberenz; (3) that the mortgage de-

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scribed in the findings herein, and set out in the plaintiffs' complaint, is void, and ought not to be foreclosed; (4) that the plaintiffs are entitled to recover, and should have judgment against the defendant William Liberenz for the sum of \$1,345, without relief from valuation and appraisement laws."

It is the law in this State that when it appears that the obligation sued upon is that of husband and wife, and is secured by a mortgage on real estate held by them as tenants by the entireties, there is no presumption that the consideration was not used for the benefit of the said real estate so held by them, or that she is surety on said obligation, but the burden is upon her to allege and prove facts showing that she executed the note and mortgage as surety, and not as principal. *Cook v. Buhrlage*, 159 Ind. 162, and cases cited; *Crisman v. Leonard*, 126 Ind. 202, 203; *Security Co. v. Arbuckle*, 119 Ind. 69, 71. Under this rule the appellants contend that the first, second, and third conclusions of law can not be sustained, because there is no finding of the ultimate fact that Louisa Liberenz executed the note and mortgage sued upon as surety for her husband. Citing *Bartholomew v. Pierson*, 112 Ind. 430.

It has been uniformly held by this court that whether or not a married woman is surety or principal on a promissory note or other obligation is to be determined, not from the form of the contract, nor from the basis upon which the transaction was had, but from the inquiry as to whether she received in person or in benefit to her estate the consideration upon which the contract depends. *Cook v. Buhrlage*, *supra*, and cases cited; *Andrysiak v. Satkoski*, 159 Ind. 428; *Field v. Noble*, 154 Ind. 357, 360, and cases cited; *Leschen v. Guy*, 149 Ind. 17, 19, and cases cited; *Nixon v. Whitely, etc., Co.*, 120 Ind. 360, 362, and cases cited; *Crisman v. Leonard*, *supra*, and cases cited; *Vogel v. Leichter*, 102 Ind. 55, 60.

It was said by this court in *Security Co. v. Arbuckle*, *supra*, on page 71, where there was a special finding: "General statements to the effect that the defendant Mary E. Arbuckle executed the note and mortgage as surety for her husband, are not a sufficient statement of facts. Whether she was surety or not depends upon the purpose for which the money was borrowed, and to which it was applied. If it was borrowed and used to pay off debts of her husband, which did not constitute valid encumbrances on the joint estate, or if it was not in some way used for her benefit or the benefit of her estate, she was a surety. These facts are not directly averred in the pleadings nor are they found by the court."

In *Voreis v. Nussbaum*, 131 Ind. 267, 16 L. R. A. 45, the note was executed by the wife, and a mortgage was executed by the husband and wife upon the separate real estate of the wife to secure the same. Under the rule declared in this State in such case, the burden was upon the wife to allege and prove that she executed said note and mortgage as surety, and not as principal. *Cook v. Buhrlage*, *supra*; *Field v. Noblett*, *supra*; *Crisman v. Leonard*, *supra*; *Miller v. Shields*, 124 Ind. 166, 8 L. R. A. 406; *Bowles v. Trapp*, 139 Ind. 55, 56, 57. It was held, however, in said case, that a finding that "her husband received the consideration for which the note was executed, and used the same in the payment of his individual debts, and for his own use; * * * [and] that no part of the consideration was used for the betterment of her separate property or business," showed that the wife executed the note and mortgage as surety only, and that the same was invalid as to her, and could not be enforced against her.

In this case the special findings state that "The \$1,000, the consideration for the note and mortgage sued upon, was used to pay the individual indebtedness of the husband, and to enable him to perform his contract to erect the livery

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barn for Yount & Yount, and that no part of said consideration was received by the wife nor was any part thereof expended in the betterment of the real estate described in the mortgage, held by them as tenants by the entireties, nor in the betterment of any other real estate then owned by her or in which she had any interest." These findings are much more favorable to the wife than those in *Voreis v. Nussbaum*, *supra*, which were held sufficient, and they are clearly sufficient under the rule declared in *Security Co. v. Arbuckle*, 119 Ind. 69, 71. It clearly appears therefrom that the wife did not receive, in person or estate, the benefit of the consideration of said note or mortgage, or any part thereof, but that the same was used to pay and execute the individual contracts of the husband. This court has uniformly held that such facts show that the wife is surety and not principal on the contract sued upon. *Cook v. Buhrlage*, *supra*; *Field v. Noblett*, *supra*; *Leschen v. Guy*, *supra*; *Nixon v. Whitely, etc., Co.*, *supra*; *Vogel v. Leichner*, *supra*; *Andrysiak v. Satkoski*, *supra*.

In *Bartholomew v. Pierson*, 112 Ind. 430, cited by appellant, the burden of proof as to the question of suretyship was upon the wife. It was stated in the special finding that the consideration of the execution of the note and mortgage was "A check on a bank for \$600, delivered to the husband by the mortgagee, the amount of which was paid to the husband by the bank. The wife received no part of the money thus obtained. * * * She signed the note and mortgage in order that her husband might obtain said money, but not for the purpose of obtaining any money for herself." The finding in said case did not show for whose benefit the money was used. It may be that it was not used for the benefit of the husband or his individual property, but for the benefit of the property of the wife. It was properly held in that case that the suretyship of the wife was not "sufficiently shown by the finding of facts." The finding in

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this case on the question of suretyship of the wife, last above set out, however, continues as follows: "And she did not receive the consideration for which the note and mortgage were executed, or any part thereof, except as herein set out."

Appellants insist that the facts found in regard to the conveyance of the real estate, upon which the livery barn was built, to Mrs. Liberenz, and the sale thereof by her for \$1,000 in excess of the liens thereon, show that she did receive \$800 of the amount loaned by appellants, and that as to that amount, at least, she is, under said facts, a principal, and not a surety. The facts found show that the \$800 was used by William Liberenz in the construction of said livery barn under his contract with Yount & Yount, but his wife then had no interest in real estate, and did not acquire any until after the barn was completed. The fact that \$800 of said loan was expended in the completion of the livery barn gave appellants no lien thereon or any interest therein. That the same was conveyed to Mrs. Liberenz, and by her sold, gave no right to appellants against her that they did not possess before. No fact found in regard to the contracts and conveyances of said real estate to and by Mrs. Liberenz in any way changed her relation to the note and mortgage sued upon, as shown by the other facts stated in the special finding. It is not found that she agreed, in consideration of the conveyance to her of the real estate upon which the barn was built, or for any other consideration, to pay the note and mortgage sued upon, nor can any such agreement be implied from the facts found. If she, a married woman, had agreed, in consideration of the conveyance of the livery barn property to her, or for any other sufficient consideration, to assume and pay the note and mortgage sued upon, her liability to pay the same would have been upon such agreement, and not by virtue of her having joined in the execution of said note and mort-

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gage. She would have been bound, under such agreement, to pay said note and mortgage, even if she had never joined in the execution thereof.

It is next insisted by appellants that Mrs. Liberenz, joining with her husband in the affidavit referred to in the findings, and obtaining a reduction in the valuation for taxation of the real estate described in the mortgage, with a full knowledge of its invalidity as to her, elected, upon a valuable consideration, to treat the note and mortgage as valid. The doctrine of election has no application in this case, under the facts stated in the special finding. The making of said affidavit, and obtaining a deduction from the valuation of said real estate for taxation did not deprive Mrs. Liberenz of her right to claim that said note and mortgage were void on account of her suretyship, unless the same amounted to an estoppel. It is settled that one who insists upon the acts or statements of another working an estoppel must show that he acted upon the same in good faith, and was influenced thereby to do some act which would result in an injury if the other is permitted to withdraw or deny the act. *Dudley v. Pigg*, 149 Ind. 363, 371; *Chaplin v. Baker*, 124 Ind. 385, 389; *Simpson v. Pearson*, 31 Ind. 1, 5-7, 99 Am. Dec. 577; *Ross v. Banta*, 140 Ind. 120, 150; *Shedd v. Webb*, 157 Ind. 585, 589; *Bowles v. Trapp*, 139 Ind. 55; *Voreis v. Nussbaum*, 131 Ind. 267, 270, 271, 16 L. R. A. 45; *Taylor v. Hearn*, 131 Ind. 537, 541; *Ward v. Berkshire Life Ins. Co.*, 108 Ind. 301, 303, 304; *Rogers v. Union, etc., Ins. Co.*, 111 Ind. 343, 345, 60 Am. Rep. 701.

It is not shown by the facts found that appellants changed their position in consequence of said affidavit, or that they relied upon it in good faith or were in any way misled thereby to their detriment. The facts stated in the special findings were not sufficient to estop Mrs. Liberenz from asserting that she was surety and not principal on the note and mortgage sued upon.

Finding no error in the record, the judgment is affirmed.

PLEASANT TOWNSHIP v. COOK ET AL.

160 533
1171 463

[No. 19,829. Filed May 13, 1903.]

DRAINS.—*Benefit to Highway.*—*Township a Party to Proceeding.*—In a drainage proceeding under §5623 Burns 1894, where a civil township is joined as a party, because of alleged benefits of the proposed drain to public highways, such highways need not be specifically described, since the benefits assessed against the township are not a lien on the highway, but a debt payable by the township. pp. 535-536.

SAME.—*Township a Party.*—*Commissioners' Final Report.*—*Notice.*—Where a township is joined as a party in a drainage proceeding, because of alleged benefits to highways, such township is not entitled to notice of the filing of the final report of the commissioners. pp. 535, 536.

SAME.—*Report of Commissioners.*—*Judgment.*—Where, in a drainage proceeding under the drainage act of 1885 as amended by the act of 1889, the court has jurisdiction of the subject-matter and of the parties, the judgment confirming the report of the commissioners is final and conclusive. p. 537.

From Laporte Circuit Court; *J. C. Richter*, Judge.

Petition of William F. Cook and others to establish a ditch. From an order striking out the motion of Pleasant civil township to set aside the assessment as to the township, and for leave to file remonstrance, the township appeals. *Affirmed.*

F. L. Fetterer and *F. A. Hollett*, for appellant.

Lemuel Darrow, *H. W. Worden* and *E. D. Salsbury*, for appellees.

MONKS, J.—This proceeding was commenced October 10, 1900, in the court below, for the construction of a ditch under the drainage law of 1885 and the amendment of 1889. §§5622-5631, 5644-5646 Burns 1894.

Appellant was made a party to said petition on account of the alleged benefit to "the highway" in said township, but no particular highway was described. Notice was given of the filing of said petition and of the time when the same

would be heard. The petition alleged that the proper work to accomplish such drainage would affect the following lands in Porter county, Indiana, to wit: "Also the highway in the civil township of Pleasant, Porter county, Indiana." The notice served on the civil township of Pleasant, Porter county, Indiana, stated that the work would affect "the highways running north and south, east and west in said township thirty-three north, range five west." Afterwards the court found and adjudged that due and legal notice of said petition had been given to each defendant, and the same was referred to the drainage commissioners for report; and afterwards, on March 11, 1901, said commissioners filed their report, which materially changed the course of said ditch, and greatly extended the same in length. The drainage commissioners found that certain highways in said Pleasant township would be benefited by the construction of said ditch, and assessed the same against appellant. Said highways extended into township thirty-two north, of range five west. Lands not named in the petition were named in said report, and the court fixed a time for hearing the report, and notice thereof was given as required by §5624 Burns 1894. This notice was served upon appellant, although not named therein. Appellant did not file a remonstrance, but remonstrances were filed by other parties. The issues made by the remonstrances were tried, the report of the drainage commissioners modified on April 20, 1901, and, as modified, was approved, the proposed work established by the court, and assigned to a commission for construction. Afterwards, on August 6, 1901, in vacation, appellant filed in the office of the clerk of the court below a motion to set aside the assessment against said township, and allow it to file a remonstrance against the final report of said commissioners. On October 2, 1901, said motion was amended and refiled in open court. Afterwards the said motion was, on motion of appellees, stricken from the docket.

The contention of appellant is that, although it was made a party to the petition, and received notice of the proceedings, it was not bound by such notice, for the reason that the highways that were found to be benefited were not specifically mentioned in the petition, nor was notice given the township of the filing of the final report of the commissioners. This contention is founded upon the idea that appellant stands in the same position, relative to this drainage proceeding, as owners of real estate assessed for benefits. This position is untenable. The statute says that "The petition shall describe in tracts of forty acres according to fractions of government surveys, * * * and give the names of the owners thereof, if known, and if unknown shall so state. * * * Such petition shall be sufficient to give the court jurisdiction over all lands described therein and power to fix a lien thereon." §5623 Burns 1894.

The statute, however, does not require that public highways shall be specifically described, nor is the assessment for benefits to the public highway a lien upon the highway, but is paid by the township in which the highway so benefited is located. The provisions of the statute on this subject are as follows: "It [the petition] shall also state that in the opinion of the petitioners either that the public health will be improved, or that one or more public highways of the county, * * * will be benefited by the proposed drainage." §5623 Burns 1894. The statute provides for the payment of this assessment by the township as follows: "Any benefits assessed to any highway shall be assessed against the proper township, and shall be paid by the trustee out of the township fund belonging to such township." §5630 Burns 1894.

The law requires that the real estate benefited be specifically described, in order that the assessment, which is a lien thereon, may be enforced against it. Appellant is a civil township. The amount assessed is the benefits to the public

highways of the township described in the report. The assessment is not a lien upon any real estate, but is simply a debt payable by the township. It is apparent that the reason for a specific description of real estate does not exist in the case of highways. The drainage law under which this proceeding was brought, did not require that appellant should be given notice of the filing of the report of the drainage commissioners, or of the time when it would be heard.

Section 5624 Burns 1894 requires that in all cases where lands are named in the report of the drainage commissioners as affected by such proposed work, which are not named in the petition, the court shall fix a time for hearing the report, and it shall be the duty of the petitioners, at their own cost, to give ten days' notice to the owners of such lands of the filing of such report in the same manner as is required by said drainage law to be given of the filing and docketing of the petition, which notice shall state the time for the hearing of such report, and in such case the court shall continue the hearing of said entire report until such last-mentioned notice has been given.

It will be observed that only the owner of lands named in the report as affected by the proposed work, and not named in the petition, must be notified of the report, and when the same will be heard. Appellant, having had notice that its highways would be benefited by the proposed drainage, was not entitled to further notice of the filing of the final report of the commissioners. Having notice of the proceedings, and knowing that the highways of the township would likely be assessed as benefited, it will not be permitted, after final judgment, to attack the finding and judgment of the court. Appellant relies upon *Goodwine v. Leak*, 114 Ind. 499, to support its position. That case, however, is not authority for permitting a township having notice of the proceeding to attack the assessment after final judgment has been rendered. Said cause was one in which

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a landowner, being a party to the petition, had other real estate assessed that was not described in the petition. After the report of the drainage commissioners was filed, and within the time fixed by statute, but before final judgment was rendered, he appeared and filed a remonstrance. This, the court held, he had a right to do; that he was not obliged to try his case by piecemeal, but might wait until he was brought into court by due notice, as required by §5624, *supra*, and thus make his remonstrance apply to the entire cause. Said drainage law, as we have shown, did not require that notice of the filing of the report of the drainage commissioners be given to appellant. In this case appellant waited until after final judgment was rendered, although notified of the pendency of the proceeding.

The court having jurisdiction of the subject-matter and jurisdiction of the parties, including appellant, the judgment confirming the report of the commissioners, as modified by the court and establishing the work, was final and conclusive. *Perkins v. Hayward*, 132 Ind. 95; *Hoefgen v. Harness*, 148 Ind. 224.

Judgment affirmed.

JONES v. THE STATE.

[No. 20,062. Filed May 13, 1903.]

APPEAL AND ERROR.—*Instructions.—Joint Assignment.—New Trial.*—A specification in a motion for a new trial that the court erred in giving a certain series of instructions is not available on appeal unless all of the instructions so specified are erroneous.

160	537
161	69
160	537
163	29
160	537
164	270

From Cass Circuit Court; *G. A. Gamble*, Judge.

William Jones was convicted of forgery, and appeals.
Affirmed.

C. E. Yarlott and *D. D. Fickle*, for appellant.

C. W. Miller, Attorney-General, *W. C. Geake* and *C. C. Hadley*, for State.

DOWLING, J.—The appellant was indicted for the crime of forgery, and, upon a trial by a jury, was found guilty as charged. Judgment was rendered upon the verdict.

The only error not waived by failure to discuss it is the overruling of appellant's motion for a new trial, and the sole point made by counsel for appellant under this assignment is that the court erred in giving instructions numbered fourteen, sixteen, and twenty-six, at the request of the State.

The motion for a new trial contained this specification: "(1) The court erred in giving instructions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, asked by the State by its own proper officer." This specification of error is joint as to all the instructions given by the court, and in such cases the rule is that if any one of the instructions is correct the objection to the action of the court in giving the instruction should be overruled.

It is said in *Indiana, etc., R. Co. v. Snyder*, 140 Ind. 647: "It is evident that, at least, some of the instructions given were proper, and that some refused were not correct, and hence, under the rule stated, the contention of appellant must fail, and this court must decline to consider the points attempted to be raised upon the instruction given or refused by the trial court." Counsel for appellant by their failure to point out any defect in the remaining twenty-three instructions given, thereby admit their correctness.

We have examined all the instructions designated in the motion for a new trial, and found that many of them are unobjectionable. For example, what defect is there in number seven, which informs the jury that circumstantial evidence is as legal and effective as any other kind, provided the circumstances proved are of such character and force as to satisfy the minds of the jury of the guilt of the defendant of the crime charged beyond a reasonable doubt?

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The rule that objections to decisions of the court should be specific and several, instead of general and in gross, where the errors relied upon relate to several distinct subjects, has been applied so frequently and in such a variety of cases that it would seem that it could not be misunderstood or overlooked. It has been applied to demurrers. *Maynard v. Waidlich*, 156 Ind. 562; *Dorsett v. City of Greencastle*, 141 Ind. 38; *Green v. Eden*, 24 Ind. App. 583. And to motions for a new trial. *Leavall v. State, ex rel.*, 16 Ind. App. 72; *Edmonds v. Mounsey*, 15 Ind. App. 399. To exceptions to conclusions of law. *Nelson v. Cottingham*, 152 Ind. 135; *Taylor v. Canaday*, 155 Ind. 671; *Baldwin v. Heil*, 155 Ind. 682; *Evansville, etc., R. Co. v. State, ex rel.*, 149 Ind. 276; *Hildebrand v. Sattley Mfg. Co.*, 25 Ind. App. 218. To assignments of error challenging conclusions of law. *Jones v. Mayne*, 154 Ind. 400; *Saunders v. Montgomery*, 143 Ind. 185. Also to assignments of error by a part only of defendants who jointly demur to the complaint and jointly except. *Harter v. Parsons*, 14 Ind. App. 331. To a joint assignment of errors upon rulings sustaining a demurrer to several paragraphs of a pleading. *Louisville, etc., R. Co. v. Heck*, 151 Ind. 292; *Moore v. Morris*, 142 Ind. 354; *American Tin-Plate Co. v. Guy*, 25 Ind. App. 588. And a joint assignment of errors has been held not good as to any, if not good as to all. *Sheeks v. State, ex rel.*, 156 Ind. 508; *Green v. Heaston*, 154 Ind. 127; *Hatfield v. Cummings*, 152 Ind. 280; *Goss v. Wallace*, 140 Ind. 541.

Again, as was said by this court in *State v. Ray*, 146 Ind. 500: "The court gave to the jury thirty-four instructions at the request of the appellee, to the giving of which appellant excepted. The exception was to the instructions given as an entirety, and not to each instruction separately. The giving of these instructions is assigned as error. Under the well settled rule, unless all of said thirty-four instructions

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were erroneous, this appeal can not be sustained. *Lawrence v. Van Buskirk*, 140 Ind. 481, and cases cited. It is not claimed by appellant that all of said instructions are erroneous, and objections are only urged against part of them. Some of said instructions correctly stated the law, and, under the rule, we can not review the action of the trial court in giving the others, however erroneous they may be."

If a motion for a new trial includes errors in giving or refusing to give instructions assigned jointly, it is not available on appeal, unless all the instructions are erroneous. *Crawford v. State*, 155 Ind. 692; *Cincinnati, etc., R. Co. v. Cregor*, 150 Ind. 625; *Masterson v. State*, 144 Ind. 240; *Cargar v. Fee*, 140 Ind. 572; *Lautman v. Pepin*, 26 Ind. App. 427; *Pape v. Hartwig*, 23 Ind. App. 333; *Week v. Widgeon*, 23 Ind. App. 405.

There being no available error in the record, the judgment is affirmed.

COPPENHAVER v. THE STATE.

[No. 20,080. Filed May 18, 1903.]

180	540
161	587
180	540
163	622
180	540
164	277
180	540
166	181

CRIMINAL LAW.—*Evidence Before Grand Jury.*—*Continuation After Return of Indictment.*—A defendant can not complain of the action of the grand jury in continuing to hear evidence as to matters of defense after returning an indictment against him, although it appears as a result of such a course that the witnesses that he afterwards calls are contradicted by their testimony before the grand jury. pp. 543-545.

180	540
168	435

SAME.—*Order for Examination of Defendant.*—Where defendant who was in jail charged with the crime of murder petitioned the court that a personal examination of himself be made by physicians for the purpose of ascertaining his mental condition, he was not prejudiced by a condition in the order that the examination should be made in the presence of the jailer, it not appearing that the jailer communicated any information thus obtained to the prosecuting attorney. pp. 545, 546.

180	540
169	387
169	563
170	214

SAME.—*Examination of Juror.*—*Conscientious Scruples as to Death Sentence.*—Where a juror on his *voir dire* was asked by the prosecuting attorney whether he had any conscientious scruples against sen-

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tencing a man to suffer death answered that he had not, no error was committed in permitting the prosecuting attorney to ask him further whether, if he should find from all the evidence in the case that defendant was guilty as charged, he could as readily vote to sentence him to death as to life imprisonment if he thought the facts warranted such a finding. pp. 546, 547.

CRIMINAL LAW.—*Trial.—Opening Statement.—Misconduct of Counsel.*—In a criminal case where the jury is the judge of the law as well as the facts, it is proper to make a sufficient statement of the law, upon the opening, to enable the jury to appreciate the evidence as it is adduced. pp. 547, 548.

SAME.—*Trial.—Misconduct of Counsel.*—No error was committed in the trial of a criminal cause in overruling a motion to set aside the submission because of alleged misconduct of counsel in his opening statement to the jury that certain threats preceding the murder amounted to express malice, since if it was proper for the court to interfere at all it should have been on motion to withdraw the statement and admonish the jury not to consider it. p. 548.

SAME.—*Trial.—Misconduct of Counsel.*—A witness who had made the arrest was asked by the defense on cross-examination whether he had ever before known of a person surrendering himself who had committed a crime punishable by death. The witness answered that he had known of one such instance, giving the name. He was then asked whether such person had not been found insane on a trial for murder, to which question an objection was sustained. While counsel for defense was making an offer to prove, the prosecuting attorney asked the witness, in a whisper, if he remembered the sentence of such person, naming the town where he was tried, and the attorney for defense moved to set aside the submission of the cause, assigning as a reason that the prosecuting attorney had prompted the witness. *Held*, that the motion was properly overruled. pp. 548, 549.

SAME.—*Trial.—Instruction.—Defense of Insanity.*—An instruction offered in the trial of a criminal cause in which the plea of insanity was interposed as a defense that the words "of unsound mind" as used in the statute include every species of mental unsoundness, arising from whatsoever cause, and must be taken to mean any idiot, *non compos*, lunatic, or monomaniac, or distracted person, that the law recognizes but two classes of persons, the sane and the insane, was misleading and properly rejected. pp. 549, 550.

SAME.—*Trial.—Instruction.—Defense of Insanity.—Instructions as to Proceedings After Acquittal.*—It was not error for the court in the trial of a criminal cause in which the defense of insanity was made to refuse to instruct the jury as to the procedure which follows in the event a person charged with a crime is acquitted on the sole ground that he was insane at the time of the commission of the act. pp. 550, 551.

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From Marion Criminal Court; *Fremont Alford*, Judge.

Orie Coppenhaver was convicted of murder in the first degree, and appeals. *Affirmed.*

Elmer Marshall, Henry Seyfried and C. J. McGroarty, for appellant.

C. W. Miller, Attorney-General, *W. C. Geake, C. C. Hadley and L. G. Rothschild*, for State.

GILLET, J.—Appellant was convicted in the above entitled cause of murder in the first degree, and it was adjudged that he suffer death. In addition to the plea of not guilty, appellant filed a special plea of insanity. To the latter plea the prosecutor replied by a general denial.

The person whom appellant was convicted of murdering was his wife. At the time of the killing, September 9, 1902, they were living apart,—as she had been compelled to leave him,—and she had taken up her residence with her mother. On the day aforesaid, appellant called upon his wife at her mother's home. After a brief conversation, he called his wife into a front room, and a few moments afterwards he fired four shots into her person, and she was found mortally wounded, with her babe in her arms. After firing the shots, appellant ran to a grocery in the neighborhood, and, at his request, the clerk telephoned for the police. When they arrived, appellant announced that he had shot his wife, and added: "It was family trouble. It is pretty tough when a wife is making up another man's bed." This remark, taken in its literal sense, had a basis in fact, since the wife had made the bed of a boarder at her mother's house the evening before the shooting, at a time when said boarder was present, and it appears that appellant may have witnessed this occurrence from the street. It is not shown that appellant had any substantial reason for suspecting that his wife was unchaste, but he was jealous of her, and had previously threatened to kill her. On being arrested, appellant stated that he did not know whether he

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had hit his wife or not, "but," he added, "I hope and pray to God that she is dead."

It is clear, in view of the uncontradicted evidence as to the circumstances of the shooting, that appellant was properly convicted if he was criminally responsible, and the hundreds of pages composing the transcript of the evidence attest the fact that the question as to his mental status at the time he shot his wife was thoroughly developed before the jury.

The indictment in this cause was returned September 13, 1902, and appellant immediately entered a plea of not guilty thereto. On September 15, 1902, a person, assuming to act for and on behalf of appellant, filed a verified motion, setting forth in substance that, notwithstanding the return of said indictment by the grand jury, it was hearing evidence as to the mental condition of appellant for the sole purpose of anticipating the defense in said cause, and stating that said proceedings, if permitted, would prevent appellant from having a fair and impartial trial, and would prejudice his defense. Prayer that the court order the suspension of further proceedings in said cause before said grand jury. This motion was overruled, and appellant, after obtaining leave, withdrew his plea of not guilty, and attempted to plead the matter above stated in abatement. A demurrer was sustained to this plea. The action of the grand jury was also assigned as ground for a new trial, and appellant's sisters, May Johnson and Ellen Huber, each made affidavit in support thereof that she was called before the grand jury on September 15, 1902, and required to testify as to the family history and antecedent conduct and conversation of appellant, and also to express an opinion as to his sanity. The only use that the State made on the trial of the testimony of said witnesses before the grand jury was in cross-examining them, and even in these instances there was nothing in their cross-examinations rela-

tive to their prior testimony that tended seriously to discredit them.

The question as to the authority of the grand jury to continue to examine witnesses concerning the commission of a crime after returning an indictment therefor, is really but a moot question in this case. Error must always be predicated on a wrong ruling, but a wrong ruling does not invariably constitute error. An improper decision will not furnish a basis for reversal where there is no room for the inference that it was probably prejudicial. Elliott, App. Proc., §§587, 632. The criminal code provides that, "In the consideration of the questions which are presented upon an appeal, the Supreme Court shall not regard technical errors or defects or exceptions to any decision or action in the court below, which did not, in the opinion of the Supreme Court, prejudice the substantial rights of the defendant." §1964 Burns 1901. While it may be that witnesses, whose time and attention are occupied by a perhaps unwarranted exercise of the inquisitorial powers of the grand jury, may well present to the court the question as to their duty to attend and answer questions after an indictment, based on the subject-matter of the examination, has been returned, yet we do not perceive how the indicted person can ordinarily complain. Even if it appears, as the result of such a course, that the witnesses that he afterwards calls are seriously contradicted by their testimony before the grand jury, it would seem to be a sufficient answer to his complaint that the search is for the truth, and that he has no such peculiar interest in his witnesses that he may successfully complain that they have been interrogated as to the facts in advance of the trial.

It was suggested in argument that the practice of grand juries hearing the evidence of the defense, instead of hearing but sufficient evidence on which to base an accusation, would lead petit juries to assume the existence of the facts presented. We do not think so; but if counsel for appellant

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had any such apprehension they should have requested the court to instruct the jury that the return of the indictment should not be treated as evidence of the allegations therein contained.

Prior to the trial, appellant filed a motion that the court allow a personal examination of himself, in the county jail, by two expert physicians, to be selected by himself and his attorneys, for the purpose of ascertaining his mental condition; and he further moved that such examination be had in a private apartment of said jail, and not in the presence of any other person or persons. The court granted the motion for an examination, on the condition, however, that the examination should take place in the presence and hearing of one Jacob Kurtz, a deputy sheriff and jailer, at the county jail wherein appellant was confined. To the latter part of the order appellant excepted, and the question as to the propriety of the limitation in the order is presented in the motion for a new trial as an irregularity in the proceedings of the court, and as an abuse of discretion, whereby appellant was prevented from having a fair trial. The motion for a new trial is supported by the affidavit of one of the persons who, as a physician, made such examination, to the effect that during the two examinations which he and another physician made of appellant said Kurtz kept very near to them, observed every movement made, and listened to every word spoken at said examinations. Facts are further averred in said affidavit tending to show that the room wherein such examinations took place was of such character that such close surveillance was unnecessary; and the affiant then avers, on information and belief, that said Kurtz was personally present and intruded his presence at such examinations at the instigation and procurement of the prosecuting attorney of Marion county, and in pursuance of an order of court procured therefor, for the purpose of informing said prosecuting attorney concerning the details of such

examinations, and thereby anticipating the evidence of the defense, and for the further purpose of hindering and intimidating affiant and his associate in the examination of said defendant.

The fact that appellant was arrested, charged with a non-bailable offense, necessarily impaired his liberty, and justified a careful surveillance of his person. Granting, however, without deciding, that the court should, as a matter of discretion, have so framed its order as to secure to said persons a reasonable degree of privacy during his examination, we are unable to perceive how the act of the jailer prevented appellant from having a fair trial. The record shows that the two physicians who visited appellant pursuant to said order made a thorough examination as to his physical and mental condition, and that they testified fully as to the result of such examination. Said Kurtz was a witness on behalf of the State, but he did not testify to anything that he saw or heard on the occasions in question. It will be observed that the affidavit did not charge, even upon information and belief, that said jailer actually communicated to the prosecuting attorney any information that he had so obtained. The record seems to dispute the affiant's claim that he and his associate were hindered or intimidated by the presence of said Kurtz. We do not perceive wherein appellant was prejudiced by the order complained of, or by the presence of said Kurtz at said examinations.

While a juror was being examined on his *voir dire*, the prosecuting attorney asked him whether he had any conscientious scruples against sentencing a man to suffer death. Upon receiving a negative answer, the prosecuting attorney then asked the juror this question: "So that, if you should find, from all of the evidence in this case, this man to be guilty as charged, I will ask you if you can as readily vote to sentence him to death as you could to sentence him to life imprisonment, if you thought the facts warranted such a finding?" Counsel for the defense objected to the question,

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on the ground "that the juror, under the law, has an option of inflicting either punishment, and can not be compelled to state in advance what view he would take in a case of this kind as to the punishment to be inflicted." The objection was overruled, and the juror answered, "I could." The objection of appellant to this line of examination was saved in a number of instances, but the question and objection are substantially the same in each instance. Under the statute it is ground for challenging a juror: "If the offense charged be punishable with death, that he entertains such conscientious opinions as would preclude his affixing the death penalty if the defendant should be found guilty." §1862 Burns 1901. When a jury reaches the conclusion that a person charged with murder in the first degree is guilty of such offense, as he stands charged, there is a matter of pure discretion before the members thereof as to whether death or life imprisonment shall be assessed as the punishment. At this juncture, a willingness to enforce the law is not enough, for the law is enforced in either event, and the prosecution is entitled to a panel of jurors who will not shrink from the assessment of the death penalty, if it appears that it ought to be imposed rather than life imprisonment. *Gross v. State*, 2 Ind. 329; *Driskill v. State*, 7 Ind. 338; *Stephenson v. State*, 110 Ind. 358. The question objected to by appellant was not a model, but the court, ruling in the light of the objection, did not err in its ruling.

During the prosecuting attorney's opening statement he spoke of threats preceding an unlawful killing as amounting to express malice. Appellant's counsel first objected to the statement, assigning as a reason that in an opening statement it is not proper to present the law to the jury. The objection was overruled, and counsel for appellant then moved to set aside the submission, a motion that was also overruled. The ground of the objection was not sufficient. In a criminal case, where the jury is the judge of the law, as well as of the fact, it is proper to make a sufficient state-

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ment of the law upon the opening to enable the jury to appreciate the evidence as it is adduced. We need not determine as to the authority of the court to correct an erroneous statement of the law in a criminal case by interfering with the course of argument. It will suffice to say that considering the nature of the misstatement, if it was proper for the court to interfere at all, counsel for appellant should have moved the court to withdraw the statement, and admonish the jury not to consider it. An exception can only be taken to an adverse decision of the court upon a matter of law. It can not be taken to the argument of the prosecuting attorney. *Choen v. State*, 85 Ind. 209; *Coleman v. State*, 111 Ind. 563. The misconduct was not of such a character as to require the setting aside of the submission, in compliance with the motion subsequently made. A like objection and motion was made while the prosecuting attorney was making a statement to the jury regarding the order of developing the evidence on the subject of insanity. For the reasons above stated, we are of opinion that the court did not err in its rulings upon said objection and motion.

A number of exceptions were reserved by appellant to the rulings of the court concerning the evidence. Most of the questions presented arise by reason of exceptions reserved to the sustaining of motions by the prosecuting attorney, to strike out certain answers of appellant's witnesses as conclusions. For the most part the rulings of the court were right. We think, however, that the court at times went a little too far in the excluding of opinions relative to matters that it was impossible adequately to describe otherwise, but in each instance the course of examination afterwards was such that we think it may be said that no substantial prejudice resulted from such rulings. The other objections arising upon the evidence are without merit.

While the State was upon its case in chief, and a policeman, named Lowe, who had testified that he had arrested appellant, was on the stand, counsel for the defense asked

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him whether he had ever before known of a person surrendering himself, who had committed a crime punishable by death or life imprisonment. The witness answered that he had known of one such instance; that a man named Rooker had so surrendered himself. The examining counsel then asked the witness whether said Rooker had not been found insane on a trial for murder. The State objected to this question and the objection was sustained. Counsel for appellant then asked: "You know, of your own knowledge, what became of Rooker, don't you; that is, at the trial?" The witness answered: "Yes, sir." Appellant's counsel then resorted to the clearly improper course of making an offer to prove, but the court required the offer to be made to the stenographer without the hearing of the jury. While counsel was so engaged, it appears that the prosecuting attorney, addressing the witness in a whisper, asked if he remembered the sentence of Rooker at Noblesville. Counsel for the defense then moved to set aside the submission, assigning as a reason that the prosecuting attorney had prompted the witness. The motion was overruled, and the witness then further answered: "I believe he was found insane, and he was sent to the penitentiary for assault and battery with intent to kill." Appellant's counsel then moved to strike out "the latter part of the answer," and the record states that this motion was sustained. It is now urged that the motion to set aside the submission should have been granted. There are a number of answers to this proposition. It is not shown that appellant was injured; the misconduct of the prosecutor was not sufficiently serious to warrant the setting aside of the submission; and the witness was only prompted as to a point in the subject-matter of an examination that was entirely collateral, and that counsel for the defense ought not to have been pursuing.

It is urged that the court erred in refusing to give instruction number two tendered by appellant. That instruction is as follows: "The words 'of unsound mind,' as

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used in the Indiana laws and statutes, include every species of insanity or mental unsoundness, arising from whatsoever cause, and must be taken to mean any idiot, *non compos*, lunatic, monomaniac, or distracted person. The law of Indiana recognizes but two classes of persons—the sane and the insane; there being no intermediaries, and consequently no such thing as a middle ground or state of partial insanity. Whether insanity existed at the time of the commission of the crime, and its character and extent, is a question of fact for the jury, to be determined from the evidence; and if, therefore, you find, from the evidence, that the defendant was of unsound mind, to any degree, from any cause, at the time of the commission of the offense charged, he is entitled to an acquittal at your hands.” The above instruction was evidently based, to a considerable extent, on the opinion of this court in *Sage v. State*, 91 Ind. 141. This court has a number of times said that it is not every statement of the law found in a law book that is proper to be given in an instruction. *Garfield v. State*, 74 Ind. 60; *Finch v. Bergins*, 89 Ind. 360; *Goodwin v. State*, 96 Ind. 550, 571, 580. The language in the *Sage* case that was made the basis of the instruction refused was made use of in holding that partial insanity is not a defense to crime. The court below fully and fairly instructed the jury upon the subject of insanity as a defense, and appellant was not entitled to an instruction which was calculated to mislead rather than instruct.

Complaint is made that the court refused to instruct as to the procedure that follows in the event that a person charged with crime is acquitted on the sole ground that he was insane at the time of the commission of the act. It is argued that appellant had the right to have the jury advised that a procedure had been provided so that a dangerous insane person would not be allowed to go at large. Concerning the duty of the trial judge in instructing the jury as

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to the law in a criminal case, it is provided by statute as follows: "In charging the jury he must state to them all matters of law which are necessary for their information in giving their verdict." §1892 Burns 1901. In a case of this kind, we think that counsel for the defense might with propriety in argument have called attention to or read the statute relative to the procedure in case a person is acquitted solely upon the ground of insanity. As a man charged with crime is entitled to the judgment of his peers as to his guilt, it is proper that his counsel should be allowed such reasonable latitude in representing his client that he may fairly persuade the judgment of the average man who presumably sits before him as a member of the jury. The provision of the law concerning a person so acquitted is a consideration that has a proper place in the argument on behalf of the defense in a case of this character. It is not necessary that the court should instruct upon the subject, however, for such matter has nothing to do with the law of the case.

It cannot be said that the verdict of the jury is contrary to law or contrary to the evidence. If the jury could have reached the conclusion that it did upon the evidence before it, even if the evidence on behalf of the State was weak and unsatisfactory, the question as to the effect of the evidence is one of fact; and this court is only authorized, in criminal cases, to pass on questions of law. *Lee v. State*, 156 Ind. 541. We do not mean to intimate that the evidence introduced by the State relative to the mental condition of appellant at the time that he shot his wife was weak. Many days were occupied in the hearing of the evidence introduced by the contending parties upon this subject, with the result that many facts and circumstances, together with opinions, professional and lay, could be summoned to the support of either hypothesis,—insanity or moral obliqueness. Upon this condition of the record, the jury having reached the conclusion that appellant was not

insane, and the trial judge, who heard and observed the witnesses, having approved the result, the verdict rests upon a foundation far too secure for this court to disturb it.

We have considered the questions presented in this case upon the merits, but it is not improper to say that as there was no exception to the overruling of the motion for a new trial, the real basis of every error assigned, and as the instructions given and refused are not incorporated in a bill of exceptions, we could not have avoided an affirmance, even if the rulings counsel discuss were erroneous.

Judgment affirmed.

GIVEN v. THE STATE.

[No. 19,945. Filed March 20, 1908. Rehearing denied May 18, 1908.]

GAS AND OIL WELLS.—Waste of Gas.—Strict Construction of Statute.—

The act of March 4, 1893, making it a penal offense to permit gas or oil to escape for a longer period than two days next after the same has been struck, is to be literally construed, since there is nothing in the act itself to show that two days is not sufficient time in which to confine such gas and oil. pp. 554, 555.

SAME.—Escape of Natural Gas.—Literal Construction of Statute.—

In a prosecution for permitting the escape of natural gas in violation of the act of March 4, 1893 (Acts 1893, p. 300), the evidence showed that a well was being drilled for oil, and that after gas was struck the drilling was continued until oil was found; that at any time after the gas began to flow into the well and to escape from it, the gas might have been confined in the well by filling the well with water, and the operation continued until oil was struck, without inconvenience. *Held*, that there was no necessity for more than the statutory time of two days in which to confine the gas, and no absurdity, injustice or oppression would result from a literal construction of the statute. pp. 554-556.

SAME.—Escape of Natural Gas.—Title and Preamble of Act.—

Construction.—The act of March 4, 1893, making it a penal offense to permit the escape of natural gas or oil for a longer period than two days next after the same has been struck, has the following title: "An act concerning the sinking, safety, maintenance, use and operation of natural gas and oil wells, prescribing penalties, and declaring an emergency." The following is the preamble: "Whereas, great danger to life and injury to persons and property is liable to result from the improper, unsafe, and negligent

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sinking, maintenance, use and operation of natural gas and oil-wells; therefore," etc. *Held*, that the public safety and not the waste of gas was the main object of the statute. p. 556.

CONSTITUTIONAL LAW.—*Police Power.—Public Safety.—Gas-Wells.*—

If the natural gas escaping from wells is dangerous to persons and property in the vicinity, the legislature, in the exercise of its police power, has the right to regulate the sinking and casing of wells. pp. 556, 557.

SAME.—*Legislation for Public Safety.—Deprivation of Property.*—A legislative act for the protection of the public is not invalidated because it results in the deprivation of property. p. 557.

STATUTES.—*Construction as to Cases Arising Subsequent to Amendment.*—

Where a statute has been amended it must be treated, in cases arising subsequent to the amendment, as if it had been enacted at the date of the amendment. p. 557.

APPEAL.—*Failure to Comply with Court Rules as to Brief.—Dismissal.*—

The failure of appellant to comply with the rule of the Supreme Court requiring separate statements in his brief of propositions relied upon, together with the authorities relied on, is a cause for dismissal of the appeal. p. 557.

From Grant Circuit Court; *H. J. Paulus*, Judge.

Edward Given was convicted for permitting the escape of natural gas in violation of the act of March 4, 1893, as amended by the act of February 22, 1899, and he appeals. *Affirmed*.

J. A. Hindman and *M. M. Powell*, for appellant.

C. W. Miller, Attorney-General, *C. C. Hadley*, *W. C. Geake* and *E. D. Salisbury*, for State.

DOWLING, J.—The appellant was prosecuted upon affidavit and information for an alleged violation of the following statute: "That it shall be unlawful for any person, firm or corporation having possession or control of any natural gas or oil-well, whether as a contractor, owner, lessee, agent or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air, without being confined within such well or proper pipes, or other safe receptacle, for a longer period than two days next after gas or oil shall have been struck in such well. And thereafter all such gas or oil shall be safely and securely confined in such

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well, pipes or other safe and proper receptacles." "Any person violating any provision of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than \$20, nor more than \$200, to which may be added imprisonment in the county jail not less than ten days nor more than sixty days; and each day during which such violation shall continue shall constitute a separate offense." §§7510, 7512 Burns 1901, Acts 1893, p. 300, Acts 1899, p. 82. Upon a trial by jury, the appellant was found guilty of the misdemeanor charged in the information, and a fine of \$20 was assessed against him. From that judgment he appeals.

The only error assigned is upon the ruling of the court on the motion for a new trial.

Counsel for appellant claim that both the proper construction of the statute above set out and its constitutionality are in question and duly presented, and, therefore, that the jurisdiction of this cause is in this court. The Attorney-General denies that any question of statutory construction is involved here, because, as he asserts, the statute is free from ambiguity. He also insists that the question of its constitutionality is not duly presented, for the reason that the record does not show that the appellant is prejudiced in any manner by the judgment upholding it.

It is apparent, however, that there is in this case a real controversy as to the meaning of §1 of the act above set out. On the one hand, a literal construction is insisted upon; while, on the other, it is claimed that a liberal interpretation is necessary to avoid absurdities, injustice, and oppression. *Church of the Holy Trinity v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226. The appellant contends that, if the construction advocated by the Attorney-General is adopted, it will result in a deprivation of private property without due process of law. *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729. The State answers that, even if this is true, the appel-

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lant can not object to the law on that account, because he is prosecuted as an agent only, and that the property affected belongs, not to him, but to his principal. We are of the opinion that enough is disclosed by the record to warrant this court in assuming jurisdiction of the appeal.

The principal controversy hinges upon the question whether the escape of natural gas from the well into the open air, with the permission of the well owner or his agent, for a longer period than two days after gas has been struck in such well, may be excused on the ground that the proprietor of the well was boring for oil, and that the completion of the well as an oil-well could not, with the best tools and appliances, and the employment of experienced and skilful workmen, be effected within the time fixed by the statute. This question in various forms is presented upon the instructions given by the court, and by others tendered by the appellant, but which the court refused to give.

It is admitted by counsel for appellant that, if a literal interpretation is to be given to the statute, and if the first section of the act of 1893, *supra*, is not subject to any constitutional objection, the appellant was properly adjudged guilty of the offense charged in the information. The argument in support of the views of the appellant is that a literal construction of the statute would be unreasonable and oppressive, contrary to the intention of the legislature, and destructive of valuable property rights. None of these grounds of objection appears upon the face of the statute. For all that is shown by the act itself, a period of two days after gas is struck may be amply sufficient to confine the gas within the well, or in pipes, or in some other safe receptacle.

Nor is it shown by the evidence that the gas could not have been so confined by the appellant within the time fixed by the statute, if he had seen fit to confine it. It seems that the well from which the gas was permitted to escape was being bored for oil. After the gas was struck, the operation

of sinking the well was continued until a flow of oil was obtained. There was no evidence that the gas-bearing rock or sand could not have been penetrated some considerable distance, and the work of confining the gas completed, within two days from the time when gas was first struck. On the contrary, it was shown that at any time after the gas began to flow into the well and to escape from it, the gas might have been confined in the well by filling the well with water, and the operation of boring or sinking the well continued without inconvenience. So far as the evidence shows, there was, therefore, no necessity for further time for confining gas in the well, and no absurdity, injustice, or oppression would result from a literal construction of the statute.

But it is said by counsel for appellant that the main purpose of the act, or the legislative intent, was the prevention of the waste of natural gas. This may have been one of the purposes of the act, although it nowhere very plainly appears. We may more reasonably presume that the intent of the legislature was to provide against the danger of explosions of the escaping gas, or the danger of fire to adjacent property, or even the danger of the contamination of the atmosphere. Indeed, the title of the act and its preamble indicate that the public safety was the main object of this statute. We cannot say that the dangers expected and feared from the escape of natural gas from the wells were unreal, or that the legislature manifested an undue solicitude for the public safety, or that it might have adopted other and less onerous methods to secure it. The public welfare is the supreme object of legislation, and in dealing with substances which are insidious in their movements, inflammable in a high degree, and which are liable to explode with the most disastrous consequences to life and property, the lawmaking power may exercise a wide latitude of discretion in its choice of methods and expedients without transcending the limits of its constitutional authority. If natural gas escaping from the well was dangerous

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to persons and property in the vicinity, the legislature, in the exercise of its police power, had the right to regulate the sinking and casing of wells, and to prohibit the owner or person in charge from permitting the escape of gas therefrom. And, even if such legislation resulted in the deprivation of property, this result would not invalidate the measures adopted for the protection of the public.

The instructions complained of coincided with the views we have expressed, and, in our opinion, were unobjectionable. Those asked for by the appellant were wholly inconsistent with our ideas of the law of the case.

The evidence as to the condition of the gas, and the situation of the gas fields of this State in 1893, was properly excluded. It could have been admitted only upon the theory that the act must be interpreted in connection with those conditions, and that its construction must be controlled by the circumstances then surrounding the business of sinking and maintaining wells. However this may be, as a rule of construction in some cases, it has no application here. The act of 1893 was amended by the act of 1899 in a most important particular, and must be treated in cases arising subsequent to the amendment as if it had been enacted at the date of the amendment. *Walsh v. State, ex rel.*, 142 Ind. 357, 33 L. R. A. 392; *Pomeroy v. Beach*, 149 Ind. 511. But, if admitted, this evidence could not have affected the result of the trial.

The appellant has failed to comply with rule twenty-two of this court, which requires a separate statement of the propositions or points, "together with the authorities relied on in support of them." The appeal might have been dismissed for this violation of the rule, but, while we have not imposed any penalty in the present case, we wish here to emphasize the importance of an observance of this rule, and to indicate to counsel the probable consequences of a disregard of its requirements.

We find no error. Judgment affirmed.

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MARION BOND COMPANY, TRUSTEE, v. MEXICAN COFFEE & RUBBER COMPANY ET AL.

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 170 397

[No. 19,982. Filed December 17, 1902. Rehearing denied May 14, 1903.]

CORPORATIONS.—*Organization.*—*Specification of Unauthorized Powers.*—*De Facto Corporation.*—*Collateral Attack.*—Where persons desiring to organize a corporation under a particular statute attempt in good faith to comply with the terms of the statute, but by mistake in naming the objects of the corporation include more than the statute authorized, the organization is a *de facto* corporation, and its legality as a corporation is not open to a collateral attack. *p. 560.*

PLEADING.—*Complaint.*—*Caption.*—*Trustee.*—The suffix, “trustee,” to the name of the plaintiff in the caption of a complaint will be treated merely as *descriptio personae*, where it does not appear from averments of the complaint that the plaintiff is the trustee of an express or other trust, or that the action is prosecuted for the benefit of a third person. *p. 563.*

From the Superior Court of Marion County; *J. L. McMaster*, Judge.

Action by the Marion Bond Company against the Mexican Coffee & Rubber Company and others. From a judgment for defendants, plaintiff appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Reversed.*

S. M. Richcreek, for appellant.

C. E. Averill and *C. F. Remy*, for appellees.

DOWLING, J.—Action by the appellant against the appellees to enforce the collection of unpaid assessments for street improvements. Answers in abatement were filed by the appellees. Demurrers to these answers were overruled, and, the appellant refusing to plead further, judgment was rendered on the demurrers. The answers set out the articles of association of the appellant and alleged that at the time they were filed there was no statute of this State authorizing the formation of a corporation for the purpose named in said instrument; that the appellant had

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no legal existence as a corporation; and that its pretended articles of association were void.

The proceedings for the incorporation of the appellant were taken under the act of 1887 (Acts 1887, p. 41) for the organization of voluntary associations, and the amendments of that act. The articles in question were filed in the proper office July 27, 1899. The act of March 5, 1895 (Acts 1895, p. 99), amending the act of 1887, *supra*, provided that any number of persons might associate themselves by written articles, to be signed by each person who might be a member at the time of organization, specifying the objects of the association, the corporate name adopted to designate such objects, the name and place of residence of each member or stockholder, with an impression and description of the corporate seal, and in what manner persons should be elected or appointed to manage the business of the association. The act applied to any association which had been or might afterwards be formed for either of the purposes, eighteen in number, specified in the act. Among these purposes were the following: "(9) * * * Buying, holding and selling real estate." "(13) * * * Buying and selling merchandise, and conducting mercantile operations." "(16) * * * Carrying on the business of insuring titles to real estate, and to make abstracts, loans and collections in connection therewith, and otherwise act as agent, attorney in fact and trustee for persons and corporations."

The articles filed by the appellant thus stated the purposes of its organization: "The object of our said association shall be the buying and selling merchandise, and conducting mercantile operations; buying and selling real estate; buying and selling state, county, municipal, and all other bonds; of borrowing and loaning money; of buying and selling promissory notes, bills of exchange, accounts, choses in action, fees, and all other evidences of indebted-

ness; and to act as agent, attorney in fact, and trustee, for persons and corporations."

Appellees contend that, under the statute, a voluntary association could be formed for a single purpose only, and that as the articles of the appellant designated more than one of the purposes specified in the statute, and other purposes not authorized at all, the articles were void, the association never had a corporate existence, and therefore could not act as a trustee or maintain a suit in a corporate capacity. No other defect or irregularity in the proceedings for the incorporation of the appellant is pointed out.

We are unable to adopt the views of the appellees. The statute authorizes the organization of voluntary associations for some of the purposes mentioned in appellant's articles. Among these are the franchises of buying and selling merchandise or real estate. These purposes were expressly named in the statute. The answer in abatement admits that the corporate organization of the appellant was regular and complete in all respects excepting in the designation of the purposes of its incorporation. It is evident that the members attempted in good faith to form a corporation under the statute. In the statement of the objects contemplated perhaps they fell into error in naming too many, but this irregularity did not, in our opinion, render the proceedings void, or deprive the association of its corporate character and powers. So far as the pleadings disclose, appellant has never engaged in any business or done any corporate act not authorized by its articles of association. For the purposes of this suit, at least, it was a corporation *de facto*, if not *de jure*. Here was a statute under which a corporation *de jure* could be formed for the purpose of buying and selling property of certain kinds, an attempt to organize under that statute, and an exercise by the proposed association of corporate powers in the execution of that purpose. In selling merchandise or real estate the appellant had the right to receive in payment street

improvement bonds, or like instruments. If they were not paid, one of its general powers as a corporation was the right to sue upon the claims. What the effect of the supposed irregularity in the organization of the appellant might be in a direct proceeding by the State in the nature of *quo warranto* we need not say. The statute under which the appellant was incorporated did not make the irregularity complained of a ground of forfeiture of the corporate franchises. It does not appear that the appellant has attempted to exercise more than one of the particular franchises mentioned in its written articles.

It is said in Thompson, Corporations, §229: "The mere fact that adventurers, in drawing their articles of association, claim greater powers or privileges than the governing statute allows, will not necessarily prevent them from becoming incorporate, since the law will reject the excessive claim as surplusage. In such a case all the acts done in pursuance of the illegal matter will be invalid, but the title of the corporation, as to all matters authorized by the statute, can not be impeached collaterally by reason of the illegal matter."

In proceedings by the State in the nature of *quo warranto*, where a corporation assumes to exercise a particular franchise, which it has no power, under its charter, to use, the judgment may be and generally is that it be ousted of the particular franchise, without affecting the right of the corporation to retain and enjoy its proper franchises. *People v. Rensselaer, etc., R. Co.*, 15 Wend. 113, 30 Am. Dec. 33; *Commonwealth v. Delaware, etc., Canal Co.*, 43 Pa. St. 295, 301; *State, ex rel., v. City of Topeka*, 31 Kan. 452, 2 Pac. 593; *State, ex rel., v. Regents*, 55 Kan. 389, 40 Pac. 656, 29 L. R. A. 378.

But where the corporation has been guilty of acts which, by statute, are made a cause of forfeiture, the rule is different. *State v. Pennsylvania, etc., Canal Co.*, 23 Ohio St. 121; *State v. Oberlin, etc., Assn.*, 35 Ohio St. 264.

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The cases of *West v. Bullskin, etc., Co.*, 32 Ind. 138 and *O'Reiley v. Kankakee, etc., Co.*, 32 Ind. 169, were under the drainage acts, which differed materially from the statute relating to the organization of voluntary associations, and the reasons there given for a strict construction of the requirement concerning the statement of the objects of the association do not apply here.

Williams v. Citizens Enterprise Co., 25 Ind. App. 351, was an action for the collection of a subscription to the capital stock of a proposed corporation, and in such cases it has been held that a different rule prevails, and that a perfect organization *de jure* must be shown.

In view of the proceedings taken by the members to incorporate the Marion Bond Company under the voluntary association act, we think it clear that a corporation *de facto* was created, which had the power to sue, and to enter into certain contracts.

Being such corporation *de facto*, the legality of its organization was not open to collateral attack in an action brought by it to enforce the collection of street improvement bonds held by said association. *Gibbs' Estate*, 157 Pa. St. 59, 27 Atl. 383, 22 L. R. A. 276.

It is said in *Beach, Priv. Corp.*, 866: "The validity of a corporate charter can not be questioned collaterally by those claiming adverse rights, but only by the state. * * * And the legality of the incorporation of an acting corporation can not be questioned in an action by it on a transferable contract of which it is the equitable assignee." See, also, *Morawetz, Priv. Corp.* (2d ed.), §745; 7 Am. & Eng. Ency. Law (2d ed.), 655, and notes 1, 2; *Jersey City Gaslight Co. v. Consumers Gas Co.*, 40 N. J. Eq. 427, 2 Atl. 922; *Toledo, etc., R. Co. v. Johnson*, 55 Mich. 456, 21 N. W. 888; *State, ex rel., v. Minnesota, etc., Mfg. Co.* (Minn.), 41 N. W. 1020, 3 L. R. A. 510; *Heaston v. Cincinnati, etc., R. Co.*, 16 Ind. 275, 79 Am. Dec. 430; *Williamson v. Kokomo, etc., Assn.*, 89 Ind. 389; *Williams*

v. *Citizens R. Co.*, 130 Ind. 71, 15 L. R. A. 64, 30 Am. St. 201.

It was said by this court in *Doty v. Patterson*, 155 Ind. 60, 64: "It is settled in this State that, when there is a statute authorizing the creation of a corporation, an attempt to comply with the statute, and an actual exercise of corporate functions, although some formalities required by law have been omitted, there is at least a corporation *de facto*, the legal existence of which can only be questioned in a direct proceeding brought by the proper party for that purpose. * * * This rule is not limited to cases where one by contract admits corporate existence, but is a rule of general application."

The good faith of the members of the appellant association in attempting to incorporate it is not questioned by the plea in abatement. They effected an apparent organization under the statute, and they proceeded in a regular manner to exercise a power authorized by the governing statute and included in their articles of association. Under these circumstances it is entirely clear that the collateral attack upon the corporate organization and powers attempted in the plea in abatement was unauthorized, and a demurrer to each of said pleas should have been sustained.

In considering the pleadings in this case, we have treated the suffix "trustee," in the caption of the complaint and in the answer, as mere *descriptio personae*. It does not appear from any averment in the complaint that the appellant is the trustee of an express or other trust, or that it prosecutes this action for the use or benefit of a third person. When an action is brought by a trustee, the complaint should disclose the name of the *cestui que trust* so that an issue, if necessary, may be formed upon that allegation, and also that the *cestui que trust* may be bound by the judgment or decree. §252 Burns 1901, §252 R. S. 1881 and Horner 1901; 22 Ency. Pl. & Pr., 193; *Mitchell v.*

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St. Mary, 148 Ind. 111; *Wolcott v. Standley*, 62 Ind. 198; *Musselman v. Cravens*, 47 Ind. 1.

The appellant, as the owner of a transferable contract, of which it was, or might lawfully be, the legal or equitable assignee, had the right to bring the action in its own name. If, upon a trial upon proper issues, it appeared to be a mere agent, another question would be presented. *Rawlings v. Fuller*, 31 Ind. 255.

The answers in abatement were insufficient, and for the errors of the court in overruling the demurrers to them, the judgment is reversed, with instructions to sustain the demurrers, and for further proceedings in accordance with this opinion.

TOLEDO, ST. LOUIS AND WESTERN RAILROAD
COMPANY v. LONG.

[No. 19,906. Filed May 15, 1908.]

MASTER AND SERVANT.—*Wages.*—*Monthly Payment.*—*Penalty.*—*Attorney's Fees.*—*Complaint.*—In an action by an employe to recover the penalty and attorney's fees as provided by §§7056, 7057 Burns 1901, for failure of the employer to make full settlement with employes once a month, in the absence of a written contract to the contrary, it must be alleged and proved that there was no such written contract between the parties.

From Clinton Circuit Court; *J. V. Kent*, Judge.

Action by Charles J. Long against the Toledo, St. Louis & Western Railroad Company. From a judgment for plaintiff, defendant appeals. *Reversed.*

C. G. Guenther, Braden Clark, Clarence Brown and C. A. Schmettau, for appellant.,

A. H. Boulden, J. T. Hockman and H. N. Spaan, for appellee.

MONKS, J.—This action was brought by appellee, an employe of appellant, for the recovery of wages, and for the recovery of a penalty and attorney's fees, under §§7056, 7057 Burns 1901, §§5206a, 5206b Horner 1897,

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Acts 1885, p. 36. An answer and a counterclaim were filed by appellant. A trial of said cause by a jury resulted in a general verdict in favor of appellee, and, over appellant's motion for a new trial, a judgment was rendered thereon against appellant for the wages, penalty, and attorney's fees. The only error assigned and not waived calls in question the action of the court in overruling appellant's motion for a new trial.

It is insisted by appellant that, under the issues, appellee was not entitled to recover the penalty and attorney's fees under said §§7056, 7057, *supra*, because the facts alleged in the complaint do not show that there was no written contract for the payment of said wages to appellee, contrary to the provisions of said sections. Several of the causes assigned for a new trial present the question of the right of appellee to recover said penalty and attorney's fees. It was held by this court in *Chicago, etc., R. Co. v. Glover*, 159 Ind. 166, that it is essential to the recovery of the penalty and attorney's fee under said sections, that the facts showing the absence of the contract mentioned in §7056, *supra*, be alleged and proved. As the complaint in this case contains no such allegations, the court erred in instructing the jury that appellee was entitled to recover the penalty and attorney's fees.

It is also urged by appellant that appellee was not entitled to recover said penalty and attorney's fees, because said sections are in violation of the state and the federal Constitutions. As this case can be decided without passing upon the constitutionality of said sections, in conformity with the well settled rule, that question is not considered or determined. *Chicago, etc., R. Co. v. Glover, supra*, and cases cited.

Judgment reversed, with instructions to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

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THORNE ET AL. v. COSAND ET AL.

[No. 20,033. Filed May 15, 1903.]

APPEAL AND ERROR.—*Error Induced by Appellant.*—Appellant will not be heard to complain of the action of the court in submitting a cause of equitable cognizance to a jury, where the cause was so submitted at the instance of appellant and over the objection and exception of appellee. *p. 567.*

DEEDS.—*Unsoundness of Mind of Grantor.*—*Undue Influence.*—*Instructions.*—An instruction that children have no natural or legal rights to the estate of their ancestors which can be asserted against the disposition of the same by the ancestors, the ancestors being free from undue influence, and of sufficient mental capacity, was proper in a suit by children to set aside a conveyance made by their mother on the ground of unsoundness of mind and undue influence. *pp. 568, 569.*

GIFTS.—*Deeds.*—*Mental Capacity of Grantor.*—A standard of mental capacity set up in an instruction in a suit to set aside a conveyance, made to a son for love and affection, on the ground of the unsoundness of mind of grantor, that one has mental capacity sufficient to make a valid conveyance if at the time he is engaged in it he understands what he is doing, and understands the extent and value of his property, recollects the property he is disposing of, the persons who are the objects of his bounty, and the manner in which he is distributing his property among them is not erroneous. *p. 569.*

EVIDENCE.—*Gifts.*—*Mental Capacity of Grantor.*—In a suit to set aside a conveyance of real estate, made for love and affection, by a wife through her son to her husband, on the ground of the mental incapacity of the grantor, evidence by the husband as to statements made by the wife at the time of such conveyance, in connection with those made by her when he previously conveyed the land to her without consideration, was admissible as showing the mental capacity of the grantor at the time of the last conveyance. *pp. 569, 570.*

From Boone Circuit Court; *B. S. Higgins*, Judge.

Suit by Irvin E. E. Thorne and others against Frank Cosand and another. From a judgment for defendants, plaintiffs appeal. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

J. M. Bailey, *C. M. Zion* and *F. C. Durham*, for appellants.

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S. M. Ralston and W. J. Darnall, for appellees.

HADLEY, C. J.—Action by appellants to set aside conveyances for unsoundness of mind of the grantor and undue influence. Appellants are sons of Susan Cosand by a former marriage. Appellee Aaron Cosand is the surviving second husband of Susan, and, appellee Frank Cosand is the son of Susan and Aaron. Susan Cosand, joined by her husband, Aaron (appellee), on February 16, 1900, executed a deed by which she conveyed her real estate in Jamestown to her son Frank (appellee) for love and affection, who, on the same day, by deed, conveyed the same to his father, Aaron. Appellants assault these conveyances, alleging in their complaint no consideration, and that their mother at the time she executed the deed to their brother Frank, was enfeebled in body and mind by disease and medicines, and was incapable of making a contract, or doing any sort of business, and was unduly persuaded, and induced to make the same. Prayer that said deeds be set aside and held for naught. Appellees answered by general denial. Trial by jury. Verdict and judgment for appellees. The overruling of appellants' motion for a new trial is the only alleged error.

Appellants' first complaint is that their cause, being of equitable cognizance, was submitted to the jury for trial. The record discloses that appellants demanded a trial by jury, and that the same was awarded them over the objection and exception of appellees. This being true they will not now, after the verdict has gone against them, be allowed to question the regularity of a step they induced the court to take over the protest of appellees. The verdict must therefore be treated in all respects as a verdict in a case at law. *Dawson v. Shirk*, 102 Ind. 184.

Further complaint is made of the giving by the court, of its own motion, instructions numbered two, three, four, eleven, and thirteen. The substance of the second was that

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the plaintiffs could not recover without "proving, by a fair preponderance of the evidence, the material allegations contained in all or in some paragraph of their complaint." The point made against the instruction is that more than one ground of action is stated in each paragraph of the complaint, namely, unsoundness of mind and undue influence, and that the instruction is misleading and erroneous, because the plaintiffs were entitled to recover if they proved all the material averments of one of these grounds. We can not grant that either paragraph of the complaint contains two grounds or causes of action. It is true that each paragraph contains averments of mental and physical weakness, and of incapacity to do business, induced by sickness, suffering, and medicines, but such averments are only descriptive of the mental state, which is shown thereby to be so enfeebled as to be unable to resist the persuasions and influences of the appellees. Unsoundness of mind is nowhere averred, and it can not be fairly said that either paragraph contains more than one substantive cause of action, and this is undue influence. The instruction, in general terms, was good as far as it went. The court did not attempt to inform the jury what constituted the material allegations, nor was it required to do so; and, if the plaintiffs desired a more specific instruction upon this point, it was their duty to have prepared one, and to have requested its delivery to the jury.

The third informed the jury that the law placed every estate under the control of the owner, and subject to such final disposition thereof as he may choose to make, either by deed or will. Children have no natural or legal rights to the estate of their ancestors which can be asserted against a disposition of the same by the ancestor. Parents have a right to dispose of their property as they please, and to judge for themselves the objects of their bounty, and, if free from undue influence and insane delusion, and of

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sufficient mental capacity, may give their property to whomsoever they will. We see no valid objection to this.

By number four the jury were instructed that one has mental capacity sufficient to make a valid conveyance if at the time he is engaged in it he understands what he is doing, and understands the extent and value of his property, recollects the property he is disposing of, the persons who are the objects of his bounty, and the manner in which he is distributing his property among them. There can be no doubt but the standard of mental capacity set up in the instruction would be sufficient to make a valid will, and it was held in *Teegarden v. Lewis*, 145 Ind. 98, "that the capacity to execute a will is the perfect requisite of a gift *inter vivos*." The conveyance to appellee Frank, to which the instruction referred, was for love and affection, and comes within the rule. It was therefore not erroneous.

The record shows that the property in controversy was purchased in 1883 by appellee Aaron Cosand, paid for by him, and the title taken in his own name. Subsequently upon the request of his wife, Susan, he conveyed the same to her without valuable consideration; and so the title remained until she conveyed it to her son Frank, February 16, 1900, a few days before her death. Upon the trial the court permitted Aaron Cosand to give statements made by the wife at the time of each of said two last-named conveyances; the court, before such statements were given, having expressly charged the jury that they should not consider them for any other purpose than to illustrate the condition of the wife's mind at the time she executed the last deed, and as furnishing grounds for the non-expert opinion of the witness as to her sanity at the time spoken of.

Appellants insist that this testimony was erroneous and harmful, because it tended to prove that their mother held the title in trust for their stepfather, and that her deed of February 16, was probably construed by the jury as an ac-

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knowledge and as an execution of the trust. It is needless to enter upon a speculative discussion of the possible effect of this testimony upon the jury, since it is firmly established by the decisions of this court that conduct, conversations, and statements of persons of questionable sanity, had and made about the time in question, may be given to the jury as tests of mental capacity, and as forming a basis upon which non-expert witnesses will be allowed to express opinions. The reasons which Mrs. Cosand gave for conveying the property to her son, with the knowledge that he would at once convey it to her husband, and whether such reasons were facts or delusions, were proper subjects of inquiry, as tending to characterize the conveyance as a rational or as an irrational act; and, within the limitation fixed by the court, the testimony was proper.

We find no error in the record. Judgment affirmed.

WINKLEBLECK v. WINKLEBLECK ET AL.

[No. 20,028. Filed May 19, 1903.]

HUSBAND AND WIFE.—*Action by Married Woman.—Pleading.—Answer.*

—In an action by a married woman on a note given to her by her husband and another, if there exists any reason on account of coverture or otherwise why such person who had joined her husband in the execution of the note should not perform his agreement, such reason must be set up in an answer to be available as a defense. An answer of no consideration is insufficient to raise the issue. *pp. 572, 573.*

TRIAL.—*Instruction.—Weight of Evidence.—Invading Jury's Province.—*

An instruction "That when witnesses are otherwise equally creditable, and their testimony otherwise entitled to equal weight, a greater weight and credit should be given to those whose means of information were superior, and also to those who swear affirmatively to a fact, rather than to those who swear negatively, or to a want of knowledge, or to a want of recollection," is erroneous, as being an invasion of the province of the jury. *p. 574.*

From Cass Circuit Court; *D. H. Chase*, Judge.

Action by Margaret Winklebleck against Andrew Winklebleck and Homer C. Winklebleck, her husband.

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From a judgment for plaintiff against Andrew Winklebleck, he appeals. Transferred from Appellate Court, under §1837u Burns 1901. *Reversed.*

M. Winfield and G. C. Taber, for appellant.

J. C. Nelson, Q. A. Myers, S. T. McConnell, A. G. Jenkins and B. C. Jenkins, for appellees.

HADLEY, C. J.—Appellees are husband and wife. Appellant is the father of Homer C. Appellee Margaret sued appellant and her husband, Homer C., in two paragraphs of complaint: First, on a promissory note dated Chicago, Illinois, July 1, 1893, calling for \$700, payable on demand to said appellee at the First National Bank of Logansport, Indiana, with six per cent. interest, and which purports to have been executed by the defendants in the name and style of A. & H. C. Winklebleck, in which firm name it is alleged appellant and appellee Homer were then trading. The second paragraph was based upon an account for services as clerk and bookkeeper. Homer C. was summoned as a defendant, but did not appear, and was not defaulted. The suit was waged between Margaret Winklebleck as plaintiff, and Andrew Winklebleck as the only real defendant. Andrew answered in ten paragraphs, in general denial, confession and avoidance, and set-off. Trial by jury, and verdict and judgment for plaintiff on the first paragraph of her complaint for \$1,014.15 against Andrew Winklebleck alone. Appellant's motion for judgment in his favor on the general verdict and answers to interrogatories was overruled, as was also his motion for a new trial. All adverse rulings are properly assigned as error.

The jury, by their answers to interrogatories, find that at the time the note sued on was executed appellees were, and had been since 1889, husband and wife, and were and had been all their married life living with appellant in Chicago, Illinois, as members of his family. The money sued for in the first paragraph, to wit, \$700, was loaned to appel-

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lant individually, and for his separate use and benefit, and was acquired by the plaintiff from her husband and her father-in-law (appellant) after and during the said marriage. The services for which the plaintiff sues in her second paragraph of complaint, and the account for boarding, clothing, and moneys furnished her, as pleaded in appellant's answers of set-off, mutually accrued while the parties were living together as one family, and the claim of each was the equivalent of the other.

Under the issue formed on the first paragraph of the complaint by an answer of no consideration, appellant first contends that the court erred in refusing to give to the jury his request number seven, and also for the same reasons erred in overruling his motion for judgment on the verdict and answers to interrogatories. The instruction requested and refused was, in substance, this: If the jury find that the parties were residents of the state of Illinois from 1890 to 1900, and that during that time the plaintiff was living with her husband, and while so living acquired money through her husband and the defendant, and in June, 1893, she had in bank \$700, such money, under the common law, which is presumed to be the law of Illinois, was the absolute property of her husband; and, if the note in suit was given for such money, the note would be simply an evidence of the debt, and the debt would be due to Homer C. Winklebleck her husband, and not to the plaintiff, and the plaintiff can not therefore recover. The instruction was properly refused because not applicable to any issue in the case. The question goes to the right of the plaintiff to maintain the action. Under our statute a married woman may sue alone when the action concerns her separate property. §255 Burns 1901. The note in suit is a written contract, which appellant entered into with Mrs. Winklebleck, and by which he received of her \$700 which he agreed to pay back to her. It is therefore presumptively her separate property, and if there exists any reason on account of her coverture or oth-

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erwise not disclosed by the record, why he should not perform his agreement, or why she should not maintain the action, it must be set up in answer to be available as a defense. Boone, Code Pl., §152; *Dillaye v. Parks*, 31 Barb. 132.

Appellant urges that the question arises under his answer of no consideration. His contention being that the undisputed evidence and the answers to interrogatories show that by the operation of the common law, which must be presumed to prevail in Illinois, the money the wife had was the absolute property of her husband, and when she loaned it to appellant it became and was a debt due the husband, which was not extinguished by the giving of the note to the wife, and which would not be discharged by payment to the wife; and that the execution of the note to the wife for money loaned by the husband was without consideration. The position is untenable. The evidence and the answers to interrogatories appealed to show conclusively that appellant did receive a consideration for the note. He received from the wife the full amount of money called for by the note he gave her. It might have been the wife's even under the common law. The husband may have waived his right to it in favor of his wife. Or the sum may have been acquired from the husband and appellant under such circumstances that a court of equity would not permit the husband to claim it, or reduce it to possession as against the wife. The husband was a party to the action, and set up no claim against her. Appellant received from the wife an undisputed title to the money borrowed, and whether it belonged to the husband or the wife was a question between them. Appellant had no right to settle it for them. It is absurd to say that the husband, being a party, and remaining passive while the wife claimed and recovered the money of appellant, could afterwards enforce payment to himself. The instruction assumes that there could be no circumstances under which the wife would have a right to the money, or

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the right to sue for it. This was too broad under any issue that could have been made.

In the third instruction given by the court of its own motion concerning the duty of the jury in weighing the evidence it was said: "That when witnesses are otherwise equally creditable, and their testimony otherwise entitled to equal weight, a greater weight and credit should be given to those whose means of information were superior, and also to those who swear affirmatively to a fact, rather than to those who swear negatively, or to a want of knowledge, or to a want of recollection."

Appellee claims, and the record fairly shows, that the chief contest was over the consideration of the note sued on in the first paragraph of the complaint. Appellee's unequivocal claim is that the note was given for \$700 loaned to appellant, while, on the other hand, appellant in his testimony is just as positive that he received no consideration at all; that he executed the note at the urgent request of his daughter-in-law at a time when he was in ill health, to enable her to get some of his life insurance money in the event of his death, and under her distinct promise that she would make no claim on the note during his life; and further that he executed the note in the name of A. & H. C. Winklebleck further to please appellee, while the fact was there was not then, and never had been, such a partnership, and his son had nothing to do with the note. Two or three other witnesses and other evidence corroborated appellee, while one other witness, a sister of appellant, who claims to have been present, and to having seen the note signed, and to have heard all the conversation between appellant and appellee leading up to it, fully corroborated the appellant. The jury, in answer to an interrogatory, found that the money was loaned as claimed by appellee. To do this they were required to believe some witnesses and disbelieve others. The testimony was in irreconcilable conflict. It was the exclusive right of the jury to determine this conflict for

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themselves, and in the doing of it to give to the testimony of each witness the weight and credit they believed him entitled to, as tested by their individual experiences in human conduct. It is the duty of the court to aid the jury by calling their attention to such facts and circumstances as may reasonably and naturally be expected to throw light upon the truthfulness or falsity of statements of witnesses, and also to caution the jury against the consideration of such things as the law forbids; but within the limits of their proper range the jury must be left free to decide, each for himself, what witness or class of witnesses is entitled to the greatest consideration. This has always been the law in this State, and an instruction in the precise language as that under consideration has been held erroneous. *Jones v. Casler*, 139 Ind. 382, 395, 47 Am. St. 274. For reasons given above we are unable to say how far, if at all, the jury were influenced in their finding by the charge complained of, and hence unable to say that appellant was not damaged thereby.

There are other questions in the case, arising upon instructions given and refused, which we have not considered for the reason that the questions involved may be easily avoided upon a retrial.

For error of the court in the giving of instruction numbered three the cause must be reversed. Judgment reversed, and cause remanded, with instructions to grant appellant a new trial.

HAMPTON v. THE STATE.

[No. 19,967. Filed May 19, 1903.]

CRIMINAL LAW.—*Incorrect Instruction.*—Use of "Consistent" Instead of "Inconsistent."—An instruction on circumstantial evidence, given to the jury in a criminal prosecution, that "the proof must not only coincide with the hypothesis of guilt, but it must be consistent with every other reasonable conclusion" was erroneous, and prejudicial error.

From Hendricks Circuit Court; *T. J. Cofer*, Judge.

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Charles Hampton was convicted of murder in the second degree, and appeals. *Reversed.*

O. E. Gulley, T. S. Adams, John McCormick, E. G. Hogate and J. L. Clark, for appellant.

C. W. Miller, Attorney-General, *W. C. Geake, C. C. Hadley, G. W. Brill, G. C. Harvey and Everett Cooper*, for State.

GILLET, J.—Appellant and three other persons were charged by indictment with the commission of murder in the first degree. Upon a separate trial, appellant was convicted of murder in the second degree, and it was adjudged that he be confined in the state prison during the term of his natural life.

There is but one assignment of error—that the court below erred in overruling appellant's motion for a new trial. A number of rulings relative to the admission of testimony have been presented for our consideration. As the case must be reversed on another ground, we have concluded that it will suffice to say concerning the evidence that proof of the acts of third persons, done after the commission of the offense, that are no part of the *res gestae* thereof, is not ordinarily admissible; and that proof of the declarations of third persons is inadmissible, if made after the commission of the crime, unless the declarations are within some exception to the rule excluding hearsay, as where there is *prima facie* evidence of some further conspiracy with which the defendant is connected, as to prevent suspicion from attaching to the guilty parties, or otherwise to enable them to escape justice, in which event declarations uttered in the effort to aid or carry forward the design of such conspiracy are admissible. See, upon these subjects, *Musser v. State*, 157 Ind. 423; *Miller v. Dayton*, 57 Iowa 423, 10 N. W. 814; *Scott v. State*, 30 Ala. 503; Best, Evidence, §506, *et seq.*

Our conclusion that the cause must be reversed is based on the giving of instruction number ten by the trial court. The

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latter part of said instruction reads as follows: "The force of circumstantial evidence being exclusive in its character, the mere coincidence of a given number of circumstances with the hypothesis of guilt, or that they would account for or concur with or render possible the guilt of the accused, is not admissible as a test, unless the circumstances rise to such a degree of cogency and force as, in the order of natural cause and effect, to exclude, to a moral certainty, every other hypothesis except the single one of guilt. The proof must not only coincide with the hypothesis of guilt, but it must be consistent with every other reasonable conclusion." In the above instruction it is apparent that the court below inadvertently used the word "consistent" instead of "inconsistent." That the instruction was erroneous, as given, is very clear.

As said in *People v. Gosset*, 93 Cal. 641, 643, 29 Pac. 246, in passing upon a somewhat similar instruction: "We see no objection to the instructions of the court to the jury except on the subject of reasonable doubt. The charge on that subject was generally correct and sufficient, because it employed language that has been repeatedly approved; but in one part of it the court, after telling the jury that a mere preponderance of evidence was not sufficient, said: 'And on the other hand, it is not required that the inculpatory facts shall be incompatible with the innocence of the accused.' This was clearly erroneous. If the facts proved were compatible with the appellant's innocence, he should have been acquitted. It is a recognized principle of English and American law, that in order to convict a defendant the facts proved must not only be consistent with the hypothesis of guilt, but inconsistent with any reasonable hypothesis of his innocence."

No general rule can be laid down for every case in which wrong words have inadvertently been used in instructions. But in this case—resting, as it does, upon circumstantial

evidence—the conclusion is unavoidable that an instruction upon that subject which directly contradicted itself was prejudicial to appellant. He was entitled, at least if he had asked it, to an instruction which would illumine the minds of the jurors as to what was required to warrant a conviction upon such evidence, and he justly complains of an instruction upon that subject that strongly tended to confuse them. See, as to contradictory instructions, *Wenning v. Teeple*, 144 Ind. 189, and cases cited; *Cummings v. State*, 50 Neb. 274, 69 N.W. 756; *Pickett v. State*, 12 Tex. App. 86; *Clare v. People*, 9 Colo. 122, 10 Pac. 799. As said in the case last cited: "It is no answer that other portions of the charge, and even other parts of the same instruction, stated correctly the law upon the subject of reasonable doubt. Where the charge in a criminal case contains in one part an important correct legal proposition, and in another an incorrect and conflicting proposition upon the same subject, the subject referred to being material to conviction, it can not be said that the error is avoided; for it is impossible to know upon which proposition the jury relied."

Many other questions are presented by appellant's counsel as grounds for a new trial, but we have concluded that it is unnecessary to consider them.

The judgment is reversed, with a direction to the court below to grant a new trial.

Hadley, C. J., did not participate.

DOWNEY ET AL. v. STATE, EX REL. HASTINGS.

[No. 19,900. Filed May 20, 1903.]

MUNICIPAL CORPORATIONS.—Officers.—Removal of City Attorney.—Discontinuance of Office.—The act of 1893 (Acts 1893, p. 50) provided that certain officers, including city attorneys appointed by the common council of cities of a certain class, should be subject to removal by said council at its pleasure. The act of 1899 (Acts 1899, p. 562) provided that city attorneys in cities of such class should not be removed from office for the term for which they

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were elected, except for cause, and contained a section repealing all laws and parts of laws in conflict therewith. *Held*, that while the latter act repealed so much of the former act as authorized the removal of city attorneys, it did not take away the power of common councils to abolish or discontinue the office of city attorney. *pp.* 581, 582.

MUNICIPAL CORPORATIONS. — *Removal of City Attorney.* — *Motives of Council.* — The action of the common council in abolishing the office of city attorney is the exercise of a legislative power, and the courts can not inquire into the motives of the council in the exercise of such power. *pp.* 582, 583.

SAME. — *Removal of City Attorney.* — Where the common council of a city abolished the office of city attorney, the incumbent was no longer an officer, and when the council again created the office he did not become city attorney by virtue of the unexpired term of office for which he was elected. *p.* 583.

From Daviess Circuit Court; *H. Q. Houghton*, Judge.

Action by the State on the relation of Elmer E. Hastings against John Downey and others. From a judgment in favor of relator, defendants appeal. *Reversed.*

O'Neill & O'Neill, for appellants.

E. C. Faith, U. G. Faith, E. E. Hastings, M. S. Hastings, J. G. Allen and J. C. Billheimer, for appellee.

MONKS, J. — Appellee brought this action against appellants. The court made a special finding of the facts, stated conclusions of law thereon in favor of appellee, and rendered judgment against appellants.

The assignment of error calls in question the correctness of the conclusions of law.

It appears from the special finding that Hastings, the relator, was elected to the office of city attorney of the city of Washington, Daviess county, Indiana, by the common council of said city, on the 12th day of September, 1898. The record of the council did not show for what length of time he was elected, but on the same day he qualified and gave bond to the approval of the common council. Said bond recited that he was elected for the term of four years. The relator entered upon the discharge of the duties of said office, and continued to discharge the same until July 30,

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1900. He drew his salary at the end of each quarter, the last quarter ending June 30, 1900. On May 28, 1900, the common council of said city passed an ordinance fixing the salaries of the various officers of said city, whereby the salary of the city attorney of said city was fixed at the sum of \$600 per year. On July 30, 1900, the common council of said city, at a regular meeting, passed a resolution abolishing said office of city attorney, and also allowed him his salary for said month of July which was paid to said relator. Said relator was present at said meeting and had actual knowledge of the passage of said resolution. After the passage of said resolution, relator was not recognized as city attorney, and he rendered no services as such. On December 10, 1900, the common council of said city passed a resolution creating the office of city attorney for said city, reciting in said resolution the necessity for such an officer. At this meeting said common council filled said office by appointment, and fixed the salary for said officer at \$600 per year. The court also states in the special finding "That the action of the common council in adopting said resolution abolishing the office of city attorney on July 30, 1900, was not done in good faith, but said resolution was adopted by said common council for the purpose of removing and ousting the relator from said office, without cause, before the expiration of the term thereof, and evading the law prohibiting such removal without cause; that no charges have ever been filed or preferred against said relator as city attorney of said city, nor has he been removed from said office for cause."

The court found, as a conclusion of law, that the relator was elected to the office of city attorney, to hold the same for the term of four years from the 12th day of September, 1898, and that he was at the time of the trial of said cause on April 3, 1902, the city attorney of said city, by virtue of his said election on September 12, 1898.

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The question to be determined is whether or not said city of Washington had the power on July 30, 1898, to abolish the office of city attorney. Section 8 of the act of March 6, 1877 (Acts 1877, p. 12), as amended by the act of February 21, 1893 (Acts 1893, p. 50, §3476 Burns 1894), provided that the officers of such city shall consist of certain officers, and among them a city attorney, if the council deem it expedient, and fixed the term of his office at four years, and provided that such officers appointed by the common council should be subject to removal by said council at its pleasure, after the first general election on the first Tuesday in May. This law was in force at the time the appellee's relator was elected city attorney for the city of Washington.

It was held by this court in *Goodwin v. State, ex rel.*, 142 Ind. 117, that under said section the common council had the power to say whether or not a city attorney should be one of the officers of the city, and, if said council deemed it expedient and elected a city attorney, such council had the power at any time thereafter to abolish or discontinue the office. The court, at page 120, said: "The legislature, by the act of 1893, §3476 Burns 1894, did not create the office of city attorney within the full sense of the term, but authorized the common council to determine whether the city should have such an officer. The power that creates an office may abolish it before the expiration of the term of the officer, and from the date the office is abolished the officer is discharged. *State, ex rel., v. Hyde*, 129 Ind. 296, 302, and cases cited."

On March 6, 1899, the legislature passed an act (Acts 1899, p. 562) which took effect the same day, and which provided that city attorneys in cities of the class to which said city of Washington belongs "shall not be removed from office for the term for which they are, or were, elected, except for cause." Said act contained a section which provided that "All laws and parts of laws in conflict with the

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provisions of this act are repealed *pro tanto*." While said acts of 1899, *supra*, repealed so much of the act of 1893 (Acts 1893, pp. 50-52, §3476 Burns 1894) as authorized the removal of city attorneys by the common council of cities of the class named in said act of 1899, it did not, in terms or by implication, take away the power of the common council of such cities to abolish or discontinue the office of city attorney, as held in *Goodwin v. State, ex rel., supra*. The fact that the common council of cities of the class named in the act of 1899, might, if they had the power, abolish the office of city attorney, and thus discharge an officer from his said office before the expiration of his term, is no reason why this court should read into said act words it does not contain. We can not indulge the presumption that any common council would abolish such office merely for the purpose of removing such officer.

It is urged by the relator that as the trial court found that the "common council did not abolish said office in good faith, but for the purpose of removing and ousting him from said office before the expiration of the term thereof, and evading the law prohibiting such removal," that the adoption of said resolution abolishing said office was void and of no effect, and that said office was not thereby abolished. It is a sufficient answer to said contention to say that the act of said common council in abolishing said office was the exercise of legislative power, and it is the settled rule in this State that the courts will not institute any inquiry into the motives of the legislative department of municipal corporations in the exercise of such power.

It was said by this court in *Lilly v. City of Indianapolis*, 149 Ind. 648, 665: "The ordinance, in plain terms, speaks for itself, and may be said to be solely a legislative act of the common council; therefore a judicial search for the motives which actuated that body in its enactment can not be instituted, and the contention of counsel for appellee that these statements made by appellants to the finance commit-

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tee were what moved the council to pass the ordinance are not in any manner available in support of the alleged cause of action. The rule is well affirmed that courts will not institute an inquiry into the motives of the legislative department in the enactment of laws. *Wright v. Defrees*, 8 Ind. 298; *McCulloch v. State*, 11 Ind. 424; *Judah v. Trustees, etc.*, 16 Ind. 56. This rule is as applicable to legislative acts of municipal corporations as it is to those of the State's legislature. 1 Dillon, Mun. Corp., §311; Beach, Pub. Corp., §516." The finding of the court as to the motives of the common council in abolishing said office must, therefore, be disregarded.

After said office was abolished on July 30, 1900, there was no such office as city attorney of said city of Washington, and thereafter the relator was not an officer of said city, because if there was no such office as city attorney of said city there could be no such officer. When the common council again created said office on December 10, 1900, the relator did not again become city attorney, by virtue of his election on September 12, 1898, for four years. The office then created could only be filled by an appointment made thereafter by said common council.

Judgment reversed, with instructions to restate the conclusions of law in accordance with this opinion, and to render judgment thereon in favor of appellants.

WRIGHT v. CHICAGO, INDIANAPOLIS AND LOUIS-
VILLE RAILWAY COMPANY.

[No. 19,976. Filed February 27, 1903. Motion to modify mandate overruled May 20, 1903.]

TRIAL.—Verdict. — *Answers to Interrogatories.* — *Conflict.* — The general verdict determines all issues in favor of the party recovering the same, and the verdict will stand as against a motion for judgment on answers to interrogatories unless the answers are in irreconcilable conflict therewith. *p. 583.*

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TRIAL.—*General Verdict.*—*Interrogatories to Jury.*—*Presumptions.*—All reasonable presumptions will be indulged in support of the general verdict, and against answers to interrogatories. p. 589.

SAME.—*Verdict.*—*Answers to Interrogatories.*—*Conflict.*—The findings of the jury in answer to interrogatories override the general verdict only when both can not stand, the conflict being such as to be beyond the possibility of being reconciled by any state of facts provable under the issues. p. 589.

SAME.—*Injury to Brakeman.*—*Dangerous Nearness of Switch Target to Track.*—*Verdict.*—*Interrogatories.*—*Conflict.*—In an action against a railroad company by a brakeman for injuries sustained by him by being struck by a switch target while he was attempting to get on the cab of an engine, the complaint alleged that the cause of the injury was the negligence of the defendant in placing the switch target dangerously near the track. *Held*, that, as against a general verdict for plaintiff, it will not be presumed that the defendant was not guilty as charged, where the answers to interrogatories to the jury did not expressly so find. pp. 589, 590.

MASTER AND SERVANT.—*Personal Injuries.*—*Knowledge of Danger.*—*Assumption of Risk.*—The mere fact, that a brakeman knew that a certain switch target was improperly located too near the track, will not prevent a recovery for personal injuries sustained thereby, unless it is further shown that he knew and appreciated the dangers thereof, and that he had sufficient time and opportunity for making objections. pp. 590, 591.

From Clark Circuit Court; *J. K. Marsh*, Judge.

Action by William Wright against the Chicago, Indianapolis & Louisville Railway Company. From a judgment for defendant, plaintiff appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Reversed*.

H. L. Means, G. H. Voigt, W. B. Moody, Carroll & Carroll and *B. H. Farnsley*, for appellant.

M. Z. Stannard, E. C. Field, W. S. Kinnan and *H. R. Kurrie*, for appellee.

MONKS, J.—This was an action brought by the appellant to recover damages for personal injuries alleged to have resulted from the negligence of the appellee. A trial of the cause was had before a jury, a general verdict being returned in favor of the appellant. The jury also returned answers to a number of interrogatories submitted by the court at the request of the appellee. On motion of appellee

the court rendered judgment for appellee on the answers to the interrogatories, notwithstanding the general verdict. The assignment of errors calls in question only the action of the court in so rendering judgment for the appellee on the answers of the jury to the interrogatories. In determining the questions presented, we can look only to the complaint, answer, general verdict, and the answers to the interrogatories.

Omitting the merely formal allegations of the complaint, it is alleged that the plaintiff, on the 2d day of July, 1898, was a brakeman on one of the defendant's freight-trains known as a "circus train;" that about 12:30 o'clock on the morning of said day, the said train was at the city of Greencastle, Indiana; that the plaintiff was one of the crew operating said train, and was subject to the order and direction of the conductor in charge thereof, and that it was his duty to obey the orders of said conductor; that the engine of said train was engaged in switching cars, and that the plaintiff was ordered by the conductor to assist in the switching, by coupling the cars and throwing the necessary switches, and that in discharging this duty it was customary and necessary, by the rules of the company, that the plaintiff should ride on the cab of the engine, in moving from one point on the track to another; that after having transferred the cars the plaintiff was ordered to throw the switch so that the engine could move to another track; that he threw the switch, signaled the engine to back, and as it moved back he attempted to get on the cab of the engine, as it was his duty to do; that he placed one foot on the lower step of the cab of the engine, and before he could place his other foot on the step the engine ran opposite to a switch-target, striking the plaintiff's foot and leg against the fans thereof, without fault upon his part, thereby throwing him from said steps under the wheels of the engine, and before he could extricate himself he was run over by said engine, one foot being entirely severed, and other serious and painful injuries being

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inflicted upon his person, from which he has suffered great physical pain and anguish, has been put to great expense in buying medicines and in securing proper medical aid, and has been permanently injured and disabled, and rendered incapable of performing any manual-labor; that said target which plaintiff was run against was negligently and carelessly constructed, and placed by defendant-dangerously and unnecessarily near the track, "and closer to the track than such targets are usually placed," and was negligently and carelessly permitted to remain in that position and condition; that the night was dark, no light was placed on the target, or in or about it, and that the plaintiff could not see it; and that he did not know of the facts which rendered the same dangerous, nor could he have known them by the exercise of ordinary care and diligence. Knowledge by the defendant of the defective condition is alleged, and that said injury resulted wholly from the negligence of the defendant, and without any fault upon the part of the plaintiff. Appellee filed a general denial to the complaint.

The facts established by the findings of the jury in answer to interrogatories may, in narrative form, be summarized as follows: Appellant, a man of mature years, had for twelve years been a brakeman on railroad trains, and had been employed by appellee in the capacity of brakeman about two years preceding the accident in question. The first year and a half of this time he worked on the division of appellee's road extending from New Albany to Bloomington, and during that time was frequently in the yards at New Albany and Bloomington, and at intermediate points on this division. The last six months before the accident he worked on the division between Bloomington and Lafayette, and during the months of May and June, 1898, he made seventeen trips through Greencastle on local freight-trains as brakeman, and on some occasions did switching in appellee's yards at Greencastle. At both the Bloomington and the New Albany railroad yards the appellee maintained switch-stands or

targets during the appellant's service of about a year and a half on said division of railroad. The switch-stands in both said yards were of the same pattern as those in use by the appellee at the time of the accident in question. The appellee, at and before the date of the accident in question, maintained in its railroad yards at the different places on its railroad split switch-stands substantially at the distance of three feet nine and one-fourth inches, and stub switch-stands substantially at the distance of four feet, from the center of the stem of such stands to the nearest point of the ball of the rail next thereto; these being the standard distances on appellee's road for placing such switch-stands. On July 2, 1898, well regulated railroads maintained their split and stub switch-stands in their railroad yards at substantially three feet nine and one-fourth inches to four feet from the center of the stem of such stands to the nearest point of the ball of the rail next thereto. Appellant had opportunity on at least five or six occasions before the date of the accident in question to observe the distance between the track of the main line of railroad and the main line of the side-track at or near the place where he was injured. On the night of his injury, and just before he was injured, appellant turned the switch in question, having at the time his lighted lantern in his hand or upon his arm, and, at the time of turning the same, he ascertained that there was no light on the switch-stand. He was vested with authority to control the fireman and the movements of the engine at and before the time he was injured, but when the engine backed toward the westward the appellant had no opportunity, before he was injured, to give any signal to stop said engine. After receiving an order from his conductor to open the switch, switch two of the cars on to the main track, and come back to switch two more cars on to the main track, he, about 12:28 o'clock a. m., caused the work of switching to be begun; the conductor opening the switch the first time, and appellant assisting in the work of switching the cars from

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the main side-track on to the main track, giving the necessary signals in so doing. Before the accident the appellant handled and adjusted the switch-target, first closing and then opening the same, and while so doing had his lighted lantern in his hand or on his arm, and at the time ascertained that there was no light on the switch-stand. After the first two cars were switched on to the main track, appellant and the fireman attempted to switch two more cars from the main side-track to the main track. As the engine returned from the switching of the first two cars, appellant stepped off the engine a few feet west of the switch-target to throw the switch, went to the switch, and, by operating the target, adjusted the switch in such a way as to connect the main track with the cross-over track. In so doing he saw and handled the switch-target. He crossed from the north to the south side of the main track, and signaled the fireman in charge of the engine, and crossed back to the north side of the main track, to a point about five feet east of the switch-stand. In obedience to the signal the engine began moving along the main track westwardly, running at the rate of from six to eight miles an hour; and as it passed the point where appellant stood he attempted to board it, and, in his haste to get on the engine, failed to think about the switch-target—the engine backing toward the west at the time—and in boarding the engine he was struck by the switch-target and injured. There was no evidence that the headlight on the engine was burning, and it is found that under the circumstances the appellant could not, by the use of his lantern, have ascertained the location of the switch-stand in question while the engine was backing toward the westward.

The general verdict necessarily determined all material issues in favor of appellant, and, unless said answers to the interrogatories are in irreconcilable conflict with the general verdict, the court erred in rendering judgment in favor of appellee on said answers. *Consolidated Stone Co. v. Sum-*

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mit, 152 Ind. 297, 300, and cases cited. By the general verdict, therefore, the jury found that appellee was guilty of the negligence alleged; that appellant did not assume the risk of the negligent construction and placing of said switch, and the failure of appellee to place a light on the switch-target; and that appellant was not guilty of contributory negligence.

It is insisted by appellee, however, that said answers of the jury to the interrogatories show: (1) That appellee was not guilty of the negligence charged; (2) that appellant assumed the risk of the alleged defective construction and placing of the switch by which he was injured; (3) that he was guilty of negligence which directly contributed to his injury.

The rule is that all reasonable presumptions will be indulged in support of the general verdict, and against the answers to the interrogatories. *Consolidated Stone Co. v. Summit*, *supra*, and cases cited; *City of South Bend v. Turner*, 156 Ind. 418, 54 L. R. A. 396, 83 Am. St. 200; *Southern Ind. R. Co. v. Peyton*, 157 Ind. 690, 697, 698.

The findings of the jury in answer to interrogatories override the general verdict only when both can not stand, the conflict being such as to be beyond the possibility of being reconciled by any state of facts provable under the issues in the cause. *Consolidated Stone Co. v. Summit*, *supra*; *City of South Bend v. Turner*, *supra*; *Southern Ind. R. Co. v. Peyton*, *supra*.

Under this rule it is clear that the facts found by the jury in answer to the interrogatories were not in irreconcilable conflict with the general verdict. The answers do not show that the switch-stand at Greencastle by which appellant was injured was either a stub or a split switch-stand, nor that the switch-stand was not nearer than three feet nine and one-fourth inches from the ball of the rail next thereto, nor that the same was not negligently placed and maintained dangerously near the railroad track, "and

closer to the track than such switch-stands are usually placed," as alleged in the complaint and found by the general verdict. We can not presume, as against the general verdict, that appellee was not guilty of the negligence charged, nor that said switch-stand at Greencastle was either a stub or a split switch; nor can we presume that it was not negligently constructed and maintained by appellee dangerously and unnecessarily near the railroad track, as alleged in the complaint and found by the general verdict. Appellee may have had stub and split switches in use, at the time of appellant's injury, of the pattern of those at Bloomington and New Albany, as shown by said answers; but said answers do not show, as against the general verdict and the presumptions in its favor, that the switch-stand at Greencastle which caused the injury was not of a different pattern, or, if of the same pattern, that it was not negligently placed and maintained dangerously near the railroad track as alleged.

It is next insisted by appellee that the answers to the interrogatories show that appellant knew, or by the exercise of ordinary care could have known, how near to the railroad track said switch was placed at the Greencastle yards, and that therefore appellant assumed the risks and hazards thereof, if it was placed dangerously near said track. The jury was not asked what distance the switch-stand which caused the injury was from the railroad track, nor whether appellant knew, or could have known by the exercise of ordinary care, what the distance was from the railroad track. The answers do not show, as against the general verdict, and the presumptions indulged to support it, that appellant knew, or by the exercise of ordinary care could have known, the distance from said switch-stand to the railroad track. But even if they showed that he had such knowledge, they do not show that he knew or appreciated the dangers and hazards thereof. Unless he knew and appreciated the dangers and hazards thereof, it cannot be said that he assumed

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the risks. *Consolidated Stone Co. v. Summit, supra*, and cases cited; *Chicago, etc., R. Co. v. Lee*, 29 Ind. App. 480. As against the general verdict, it can not be said that the answers show that appellant ever saw said switch-stand before he opened and closed the switch on the night of his injury, or that in the exercise of ordinary care he could have seen it before that time. If appellant first saw it on that night, and even if he then knew, or could by the exercise of ordinary care have known, that it was dangerously near the track, and knew and appreciated the hazards and risks thereof—things not shown by the answers to the interrogatories—it could not be said as a matter of law, as against the general verdict, that appellant, by continuing to assist in switching the cars until his injury, assumed the risks and hazards of said switch-stand being dangerously near the railroad track, for the reason that the knowledge thereof came to him so recently that he may have had no opportunity before the injury to make objection or complaint to anyone representing the master. *Louisville, etc., R. Co. v. Kelly*, 63 Fed. 407, 409, 11 C. C. A. 260, 263.

It is next insisted by appellee that the answers show that appellant's "own negligence contributed to the production of his injuries." After a careful examination of the answers to the interrogatories, we are constrained to hold that as against the general verdict they do not show that appellant was guilty of negligence which directly contributed to his injury.

It follows that the court erred in sustaining appellee's motion for a judgment on the answers to the interrogatories, notwithstanding the general verdict. We are of the opinion, however, that justice requires that a new trial of the cause be ordered. Judgment reversed, with instructions to the trial court to award a new trial, and for further proceedings not inconsistent with this opinion.

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ROYSE ET AL. v. EVANSVILLE AND TERRE HAUTE RAILROAD COMPANY ET AL.

[No. 19,749. Filed May 21, 1903.]

DRAINS.—Levee.—The act of 1891 (Acts 1891, p. 455, §5690 *et seq.* Burns 1901), authorizing the board of county commissioners to cause to be located and constructed, straightened, widened, altered or deepened any ditch, drain or watercourse of the length of five miles or more when the same is necessary to drain any lots, lands, public or corporate roads, or railroads, and providing that the petition therefor shall include any side, lateral, spur or branch ditch, drain or watercourse, the lowering of any lake or other work necessary to secure fully the object of the improvement petitioned for, whether the same is mentioned or not in such petition, does not authorize the building of a levee, where the same is not a mere incident to the construction of the drain, but is rather the principal improvement. *pp. 593-596.*

SAME.—Levee.—Where a petition for the construction of a ditch included the construction of a levee which the court held was not authorized by the act under which the proceeding was brought, and such petition treated the entire improvement as a unit, and proceeded on the theory that both the ditch and the levee were required to accomplish the desired ends, the court properly dismissed the proceeding instead of referring it back to the viewers with instructions to amend their report so as to limit the proceeding to the construction of a ditch. *pp. 596, 597.*

From Knox Circuit Court; *O. H. Cobb*, Judge.

Proceeding by John Royse and others for the construction of a ditch and levee. The Evansville & Terre Haute Railroad Company and others filed a motion to dismiss the proceeding, and upon the overruling of the motion the case was appealed. From the action of the circuit court dismissing the proceeding, petitioners appeal. *Affirmed.*

John Wilhelm, W. A. Cullop, G. W. Shaw, W. H. DeWolf and E. H. DeWolf, for appellants.

J. E. Iglehart, Edwin Taylor, J. W. Emison, W. W. Moffett and S. W. Williams, for appellees.

GILLET, J.—Appellants filed in the office of the auditor of Knox county their petition showing that their lands would be “benefited or drained” by the straightening, widening, altering, and deepening of a certain watercourse, by the location and construction of a ditch, and by the establishing and building of a levee. It is alleged that the proposed drain is more than five miles in length, and that the construction of said work is necessary to drain and reclaim the land over which the same passes, as well as public roads thereon, and will be conducive to the public health, convenience, and welfare. The petition then sets forth the route and plan of the improvement petitioned for. The route of the proposed drain follows the general course of a stream or watercourse, known as the Duchee river, for some distance, and then extends south to White river. The course of the proposed levee is described in the petition as extending along the west side of said drain, and as near thereto as practicable, from the commencement thereof to White river, and from the latter point along the north shore of said river, following the meanderings thereof, to a point about two miles west of said drain. The petition affirmatively states that it is based on an act entitled, “An act concerning drainage under specified conditions, and declaring an emergency,” approved March 7, 1891. Acts 1891, p. 455, §5690 *et seq.* Burns 1901.

The petitioners filed a bond with their petition, as required by law, and the bond was duly approved. The board of commissioners appointed viewers, who reported favorably. This report was approved, and the board directed the viewers to lay out the work, assess the benefits and damages, etc. The viewers afterwards filed their second report, showing their doings in the premises, which report was subsequently approved by the board, and the work ordered established. While the proceeding was still before the commissioners, the appellees filed separate motions to dismiss the

proceeding, for the reason, among others, that the court had no jurisdiction over the subject-matter thereof. These motions were overruled, appellees afterwards appealed, and renewed their motions in the circuit court, where they were sustained, and from the judgment of dismissal the appellants appeal.

Did the court err in dismissing the proceeding? The act in question does not, as do some of the drainage acts of the State, enact a rule of liberal construction, and as the proceeding involves a taking of private property by the power of government, the opposite construction must prevail. *Lewis, Eminent Domain* (2d ed.), §254.

Statutes concerning the drainage of land ordinarily contemplate the removal of water therefrom by means of an artificial channel or trench. 10 Am. & Eng. Ency. Law (2d ed.), 221; *City of Valparaiso v. Parker*, 148 Ind. 379. On the other hand, the word "levee" is defined as "An embankment intended to prevent inundation." *Anderson's Law Dict.* The word has also been defined as "An artificial mound of earth intended exclusively as a protection from overflow." 18 Am. & Eng. Ency. Law (2d ed.), 838. If the construction of a levee is a work entirely foreign to the contemplation of the statute, the provisions of the enactment will not be extended to accomplish such purpose. *Scruggs v. Reese*, 128 Ind. 399. It is claimed that §1 of the act in question is broad enough to authorize the construction of such a work. That section, omitting the enacting clause, is as follows: "That the board of commissioners of any county in the State of Indiana, are authorized at any regular or called session, to cause to be located and constructed, straightened, widened, altered, or deepened any ditch, drain or watercourse of the length of five miles and upward as hereinafter provided, when the same is necessary to drain any lots, lands, public or corporate roads, or railroads, or will be conducive to the public health, convenience or welfare. The word 'ditch,' used in this act, shall be held

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to include a drain or watercourse or any drain or watercourse heretofore constructed. The petition for any such improvement shall be held to include any side, lateral, spur or branch ditch, drain or watercourse, the lowering of any lake or other work necessary to secure fully the object of the improvement petitioned for, whether the same is mentioned or not in such petition; but no such improvement shall be located unless a sufficient outlet is first found by the court to exist or is provided by such improvement." The act, as the title indicates, is "an act concerning drainage under specified conditions." Section one contemplates the construction, etc., of "any ditch, drain or watercourse," under certain circumstances. The provision that the petition "shall be held to include any side, lateral, spur, or branch ditch, drain or watercourse, the lowering of any lake or other work necessary to secure fully the object of the improvement petitioned for," does not authorize the construction of a levee, except possibly as an incident of the main work. "The object of the improvement to be petitioned for," within the legislative contemplation, is drainage, and the provision that the improvement shall not be located "unless a sufficient outlet is first found by the court" but emphasizes the purpose of the legislature. The words "or other work," found in the statute, if not within the *ejusdem generis* rule of construction, refers to a work that contributes to drainage. If the legislature had had a purpose to authorize the holding back of water in addition to drainage as a substantive part of a scheme for the reclamation of overflowed lands, it is fair to presume that the purpose would have been expressed in the enactment, as it is in the circuit court drainage act. §5624 Burns 1901. The work of building a levee could, of course, be done under the provisions of the act of March 5, 1889. Acts 1889, p. 104, §7202 *et seq.* Burns 1901. The act of March 8, 1897 (Acts 1897, p. 208), providing for the maintenance of levees and flood-gates constructed under said act of March

7, 1891, *supra*, while not controlling as to the meaning of said act, contains persuasive evidence of such meaning, since the preamble declares that "It does not appear that the same [levees and flood-gates] could be legally constructed under said act." It is our conclusion that the act in question does not authorize the building of a levee where the same is not a mere incident to the construction of a ditch or drain, but is rather the principal improvement.

In this case it appears on the face of the petition that the construction of the levee is not an incident to the ditch. The fact that the petition asks for the construction of a levee to parallel the ditch its entire length, and to extend some two miles to the west of the mouth of said ditch, indicates that the levee is the principal improvement. In fact, it is admitted in the brief of counsel for appellants that the object of this proceeding is to reclaim many thousands of acres which lie to the north and west of said levee by excluding the waters of White river therefrom.

It is insisted, however, on behalf of appellants that the petition was at least sufficient for a ditch, and that, if a levee can not also be built under the act, the court, instead of dismissing the proceeding, should have referred it back to the viewers, with an instruction to amend their report so as to limit the proceeding to the construction of a ditch. The petition alleges that "the construction of said work [referring to the ditch and levee] is necessary" to accomplish the objects, public and otherwise, mentioned therein. The proposed improvement is treated as a unit in such instrument, and an issue is tendered as to what will be accomplished thereby. In other words, the petition proceeds on the theory that both the ditch and the levee are required to accomplish the desired ends, and the proposition to construct a levee can not be eliminated from the petition without at the same time eliminating vital allegations as to what the improvement will accomplish. These matters lay at the very threshold of the right to invoke the statute, and

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the court could not properly refer the proceeding to the viewers, to construct a ditch, without any determination of the right to proceed, and without any issue tendered thereon. As the allegations of the petition are so interwoven that the board was called on to approve the work as a whole, if it acted favorably upon the petition, and as it was not authorized to establish the entire work, we think that the court below did right in treating the matter as jurisdictional, and dismissing the proceeding.

Judgment affirmed.

CITY OF ANDERSON v. FLEMING.

[No. 20,011. Filed May 22, 1903.]

MUNICIPAL CORPORATIONS.—Damages.—Independent Contractor.—A city is liable equally with the contractor to a person who was injured by stepping into an excavation across a sidewalk made by an independent contractor, where such excavation was authorized by the contract and was of such a character as to render the sidewalk dangerous for public travel. *pp. 597-601*

JUDGMENTS.—Personal Injuries.—Municipal Corporations.—Independent Contractor.—Former Adjudication.—Where one who received an injury by stepping into a dangerous excavation across a sidewalk, made by an independent contractor, brought suit against the contractor for the injuries sustained, which resulted in a judgment for the defendant, such judgment may be pleaded in bar of an action by such person against the city for such injuries. *pp. 601-604.*

From Superior Court of Madison County; *H. C. Ryan*, Judge.

Action by Elizabeth Fleming against the city of Anderson. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Reversed.*

G. M. Ballard, W. A. Kittinger, W. S. Diven and B. H. Campbell, for appellant.

C. K. Bagot and Thomas Bagot, for appellee.

MONRS, J.—This action was brought by appellee against appellant in March, 1900, to recover damages for personal

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injuries received in October, 1898, by stepping into an excavation in one of the streets of said city. A trial of said cause resulted in a verdict in favor of appellee, and, over a motion for a new trial, judgment was rendered thereon against appellant.

The errors assigned call in question the action of the court in overruling the demurrer to the complaint, in sustaining appellee's several demurrers to the second, third, and fourth paragraphs of answer, and in overruling appellant's motion for a new trial.

It is insisted by appellant that the complaint is insufficient, because: (1) It appears from the allegations contained therein that said excavation was made by a contractor in performing the work of improving a public street of appellant under a contract with appellant, and it is not averred that appellant had any notice or knowledge of the existence of said excavation at or before the time of appellee's injury; (2) it appears from the complaint that appellee was guilty of contributory negligence.

It appears from the complaint that on the night of October 14, 1898, appellee was walking along a public sidewalk in the city of Anderson, and that she fell into a deep excavation extending across said sidewalk, and was injured; that said sidewalk was "very much traveled by persons on foot; that the excavation across said sidewalk was of such a character as to render said sidewalk dangerous and unsafe for travel, and greatly to endanger life, limb, and the safety of persons traveling upon said sidewalk in the nighttime." There were no guards, lights, signals, or other warnings of danger to the public about or near said excavation. Appellee had no notice or knowledge of the existence of said excavation, and she was unable to see the same on account of the darkness of the night. Said excavation was made by an independent contractor under a contract with appellant for the improvement of a public street, and the

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sidewalks on each side thereof. Said contract provided that said contractor "should maintain the sidewalks along said street during the construction of said improvement safe for travel by the general public, and that he should properly guard all places of danger along said street during the construction of said improvement." That appellant had full notice and knowledge that said excavation was made across said sidewalk, and knew of its existence from the time it was made. It is evident that the complaint is not open to the objections urged.

The facts alleged in the third paragraph of answer show that the excavation into which appellee fell was made by an independent contractor, under a contract with appellant for the improvement of a public street in said city.

It is insisted by appellant that a municipal corporation is not liable for the negligence or the wrongful acts of an independent contractor in the work of improving a public street under a contract with such corporation, and that for this reason the court erred in sustaining appellee's demurrer to said third paragraph of answer.

The general rule is that an employer is not liable for an injury caused by the negligence or the wrongful acts of an independent contractor in executing the work in compliance with his contract, but this rule does not apply when the contract requires the performance of work intrinsically dangerous. *City of Evansville v. Senhenn*, 151 Ind. 42, 59, 41 L. R. A. 728, 68 Am. St. 218; *City of Logansport v. Dick*, 70 Ind. 65, 78-81, 36 Am. Rep. 166, and cases cited; *Park v. Board, etc.*, 3 Ind. App. 536, 538-541, and cases cited; *Dillon, Mun. Corp.* (4th ed.), §§1028, 1029; *Elliott, Roads & Sts.* (2d ed.), §633; *Shearman & Redfield, Negligence* (5th ed.), §§164-168.

A municipal corporation is charged with the duty of maintaining its streets in a reasonably safe condition for travel. *City of Crawfordsville v. Smith*, 79 Ind. 308, 310,

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41 Am. Rep. 612, and cases cited; *City of Indianapolis v. Doherty*, 71 Ind. 5, and cases cited; *Town of Centerville v. Woods*, 57 Ind. 192, 195.

As between the municipal corporation and the public the duty rests primarily upon the corporation, and cannot be evaded or suspended by any act of its own. *City of Logansport v. Dick, supra*; *Park v. Board, etc., supra*; *Robbins v. Chicago City*, 4 Wall. (U. S.) 657, 18 L. Ed. 427; *Water Co. v. Ware*, 16 Wall. (U. S.) 566, 21 L. Ed. 485; *Brusso v. City of Buffalo*, 90 N. Y. 679, and cases cited; *Dillon, Mun. Corp.* (4th ed.), §1027; Note to *Goddard v. Inhabitants of Harpswell*, 30 Am. St. 411-413.

Judge Dillon, in his work on municipal corporations (4th ed.), §§1027, 1030, says on this subject: "§1027. Whether the duty of maintaining the streets in a safe condition for public travel and use is specially imposed on the corporation, or is deduced in the manner before stated, *it rests primarily, as respects the public, upon the corporation*, and the obligation to discharge this duty can not be evaded, suspended, or cast upon others, by any act of its own. Therefore, according to the better view, where a *dangerous excavation is made* and negligently left open (without proper lights, guards, or covering), in a traveled street or sidewalk, *by a contractor under the corporation* for building a sewer or other improvement, the corporation is liable to a person injured thereby, although it may have had no immediate control over the workmen, and had even stipulated in the contract that proper precautions should be taken by the contractor for the protection of the public, and making him liable for accidents occasioned by his neglect."

"§1030. Accordingly, the later and better considered cases in this country respecting streets have firmly, and, in our judgment, reasonably, established the doctrine that, where *the work contracted for necessarily constitutes an obstruction or defect* in the street, of such a nature as to render it unsafe or dangerous for the purposes of public

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travel, unless properly guarded or protected, the employer (equally with the contractor), where the injury results directly from the acts which the contractor engaged to perform, is liable therefor to the injured party. But the employer is not liable where the obstruction or defect in the street causing the injury is wholly collateral to the contract-work, and entirely the result of the negligence or wrongful acts of the contractor, subcontractor, or his servants. In such a case the immediate author of the injury is alone liable."

From the allegations of the complaint, which are not denied in said third paragraph of answer, it appears that in making said improvement under the contract, the contractor dug said excavation across said sidewalk, and that the same "rendered said sidewalk dangerous and unsafe for travel, and that it greatly endangered the life, limb, and person of persons traveling upon said sidewalk in the night-time." Under the authorities cited, if the excavation which occasioned the injury resulted directly from the acts which the contractor agreed and was authorized to do, and the same was of such a character as to render said sidewalk unsafe and dangerous for the purposes of public travel, as alleged, appellant was liable equally with the contractor for appellee's injury, if received by her without contributory fault. It follows that the court did not err in sustaining the demurrer to the third paragraph of answer.

The second and fourth paragraphs are pleas of former adjudication. It appears from each of said paragraphs of answer that in 1899 appellee sued the independent contractor who made said excavation across said sidewalk for the same injuries sued for in this action, and that a trial of said cause upon the merits resulted in a judgment against appellee. No objection is made to the form of said paragraphs, but it is insisted that the liability of the contractor and appellant was joint and several, and that a judgment on the merits in favor of the contractor can not be pleaded

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by appellant in bar of this action. The established rule in this State is that when a street of a municipal corporation is rendered unsafe by the wrongful act or negligence of a third person, and the corporation is compelled to pay for injuries caused by said unsafe streets, it has a right of action over against the person who rendered the same unsafe, for the amount so paid, and, if properly notified of the action, such person is bound and concluded by said judgment recovered against the corporation. *McNaughton v. City of Elkhart*, 85 Ind. 384, 391; *Town of Centerville v. Woods*, 57 Ind. 192, 196, 197; *City of Elkhart v. Wickwire*, 87 Ind. 77, 80; *Town of Elkhart v. Ritter*, 66 Ind. 136, 143; *Inhabitants of Lowell v. Boston, etc., R. Co.*, 23 Pick. 24, 34, 34 Am. Dec. 33; *Chicago City v. Robbins*, 67 U. S. (2 Black) 418, 17 L. Ed. 298; *Village of Port Jervis v. First Nat. Bank*, 96 N. Y. 550; *City of Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475, 486, 7 Am. Rep. 469; *Mayor, etc., v. Brady*, 30 N. Y. Supp. 1121; *Smith, Mun. Corp.*, §§1305, 1533; *Elliott, Roads & Sts.* (2d ed.), §870; *Shearman & Redfield, Negligence* (5th ed.), §24a; 21 Am. & Eng. Ency. Law, 161, 162.

The municipal corporation, by payment of such damages, is entitled to be subrogated to the cause of action against the one whose negligence or wrongful acts rendered the street unsafe, which the injured party originally had. In such cases, as between the municipal corporation and the one who created the dangerous condition which occasioned the injury, the latter is primarily liable, and said corporation, having been compelled to pay such damages to the one injured, becomes subrogated to the remedy of such injured party. *Smith, Mun. Corp.*, §1305, and note 209.

It was held in *City of Buffalo v. Holloway*, 7 N. Y. 493, 57 Am. Dec. 550, and note pp. 553, 554, that one who contracts with a municipal corporation for the improvement of a public street is under no obligation to the corporation properly to guard places in said street made dangerous by

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said work during the progress thereof, unless the contractor, by his contract, has agreed to use the necessary precautionary measures to protect the public. The correctness of this rule seems to be questioned in Dillon, Mun. Corp. (4th ed.), §1027, note 1. In this case, however, it was stipulated in the contract that proper precautions should be taken by the contractor to protect the public from injury. We are not required, therefore, to determine as to the correctness of the rule declared in *City of Buffalo v. Holloway*, *supra*.

It is clearly established by the authorities cited that if appellee was injured, without contributory fault on her part, by reason of said excavations being negligently left open, without proper guards or signals, as alleged, appellant would be entitled to recover from the contractor whatever appellee might recover against it. Such right, as we have shown, would rest upon the principles of subrogation. Appellant would be entitled to be subrogated to appellee's right of action against the contractor, but the judgment on the merits in the contractor's favor in appellee's action against him conclusively adjudged that he was not liable to appellee, or any person claiming under her, for the same cause of action. If appellee was not entitled to recover for said injury against the contractor, she is not entitled to recover therefor against appellant.

The contractor had the right, if duly notified by appellant, to appear and set up said former judgment in his favor against appellee in bar of this action against appellant, and appellant has the same right; otherwise the contractor would have to defend the same cause twice on its merits. *Hill v. Bain*, 15 R. I. 75, 23 Atl. 44, 2 Am. St. 873; *Featherstone v. President of Newburg*, 71 Hun 109, 24 N. Y. Supp. 603; *Van Fleet*, Former Adjudication, §§572, 573; *Black*, Judgments (2d ed.), §574. See, also, *King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675; *Emery v. Fowler*, 39 Me. 326, 63 Am. Dec. 627, and note p. 631; *Atkinson v. White*, 60 Me. 396; *Lyon v. Stanford*, 42 N. J. Eq. 411,

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414, 7 Atl. 869; *Bates v. Stanton*, 1 Duer (N. Y.) 79, 88; *Chicago, etc., R. Co. v. Hutchins*, 34 Ill. 108; *Carter v. Bowe*, 41 Hun 516; *State v. Coste*, 36 Mo. 437, 88 Am. Dec. 148; *Gill v. Morris*, 67 Tenn. 614, 622, 27 Am. Rep. 744; *Castle v. Noyes*, 14 N. Y. 329; *Brown v. Bradford*, 30 Ga. 927; *Crum v. Wilson*, 61 Miss. 233, 236; *Renkert v. Elliott*, 79 Tenn. 235, 249, 250; Herman, Estoppel, §152; Black, Judgments (2d ed.), §§588, 589; Freeman, Judgments (4th ed.), §§174, 179.

It is said in *Van Fleet*, Former Adjudication, §572: "If A, as between himself and B, is primarily liable upon an alleged cause of action held by C, or is responsible over to B for any judgment recovered against him by C, and C sues A in the first instance and is defeated on the merits, he can not afterwards sue B. If he could, A would be compelled to defend twice against the same action—once for himself and once for B. * * * If a town is sued for injuries caused by an obstruction wrongfully placed in a street by a person, he may be notified to defend, and, in such case, he will be bound by the judgment. Therefore, if he is sued in the first instance and defeats the case, the town may plead this judgment in bar of an action against it; otherwise the wrongdoer would have to defend the same action twice." It follows that the court erred in sustaining appellee's demurrer to the second and fourth paragraphs of answer.

As the other questions argued may not arise on another trial, they are not considered.

Judgment reversed, with instructions to overrule the demurrers to the second and fourth paragraphs of answer, and for further proceedings not inconsistent with this opinion.

SEILER v. STATE, EX REL. BOARD OF COMMISSIONERS.

[No. 19,892. Filed January 9, 1903. Rehearing denied May 22, 1903.]

COUNTIES.—*County Board of Review.—County Auditor.—Compensation.*—

The act of 1895 (Acts 1895, p. 74) provides that the county board of review "shall be composed of the county assessor, county auditor and county treasurer, and two freeholders to be appointed by the judge of the circuit court, who shall each be paid out of the county treasury, the sum of \$3 for each and every day while they are acting as members of said board." *Held*, that the county auditor is entitled to the per diem compensation the same as other members of the board who are not county officers. *pp.* 605-611, 622-627.

SAME.—*County Board of Review.—County Auditor.—Compensation.*—

Statutes.—Repeal.—The act of 1895 (Acts 1895, p. 74), fixing a compensation of \$3 a day to county auditors for services on the board of review, is not repealed by the fee and salary law of 1895 (Acts 1895, p. 319) enacted ten days thereafter, nor does such later act require a county auditor to tax and charge the amount which he was allowed, under the former statute, for his services as a member of the board of review, as a fee in favor of the county, and when the money was received by him, to return it to the treasurer as the property of the county. *pp.* 611-622.

From DeKalb Circuit Court; *E. D. Hartman*, Judge.

Action by the State on the relation of the board of commissioners of DeKalb county against Frank P. Seiler. From a judgment in favor of plaintiff, defendant appeals. Transferred from Appellate Court, under §1337o Burns 1901. *Reversed.*

Frank S. Roby, S. A. Harper, E. D. Salsbury, R. O. Hawkins and H. E. Smith, for appellant.

P. V. Hoffman, D. M. Link, R. K. Kane and W. A. Ketcham, for appellee.

JORDAN, J.—The board of commissioners of the county of DeKalb instituted this action to recover of appellant \$78, which amount he had previously received from the treasury of that county in payment of services rendered by him as a member of the county board of review. Appellee suc-

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181	571
181	574
181	582

180	606
183	417

180	606
185	101

180	606
188	576

180	606
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189	477
189	480

180	606
171	341

ceeded in obtaining a judgment against him for that amount, from which this appeal is prosecuted. The errors assigned are that the court erred in overruling the demurrer to the first paragraph of the complaint, and in denying appellant's motion for a new trial.

The complaint is in two paragraphs. The first charges that appellant was the duly elected and qualified auditor of DeKalb county, Indiana, and as such auditor he, by virtue of his office, served as a member of the board of review of said county in the year of 1899; that for such services he was allowed and received the money in question from the treasury of that county; that under the law he was chargeable with the duty of having the amount credited to the county officers' fund, but in violation of this duty he drew the money from the said treasury as due to him for his services upon said board, and thereafter unlawfully appropriated and converted the same to his own use, etc. The second paragraph alleges generally that the defendant is indebted to the plaintiff in the sum of \$78 for money received by him for the use of said plaintiff.

The undisputed facts, as established by the evidence, show that appellant was the duly elected and qualified auditor of DeKalb county, Indiana, and while the incumbent of that office, during the year 1899, he served for a period of twenty-six days as a member of the board of review of that county. Prior to his entering upon the discharge of his duties as such member he took and subscribed the oath provided by the statute. After performing the duties as a member of said board for the time mentioned he presented a claim for the amount due him for his said services to the board of commissioners of said county. This claim the board duly allowed, and directed that an order for the amount thereof, to wit, \$78, be drawn upon the county treasurer in favor of appellant. This warrant was accordingly drawn and presented by him to the county treasurer, and paid out of the funds of the county. He received the

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money under the claim that it was due and belonged to him, and thereafter he refused on demand to turn the amount back into the treasury as belonging to the county officers' fund.

The sole question involved is whether appellee is entitled to the money which it seeks, under the facts; to recover of appellant. The contentions of the latter's counsel are: (1) That in serving as a member of the board of review he was acting independently of the office of auditor, and was not discharging the duties as a member of the board by virtue of his holding said office, consequently, the contention is, that the fee and salary law of 1895, in respect to the fees and salaries of county officers, does not apply to or control the question involved; (2) if it can be said that appellant, while serving as a member of the board of review, was in discharge of duties imposed upon him as auditor, then under this view the above salary statute of 1895 can not be construed so as to require him to turn back into the county treasury the per diem compensation which he received for acting as a member of the board of review.

The contentions of appellee's counsel are: (1) That the statute under which appellant was allowed and received the money in controversy does not intend to award any compensation to any of the members of the county board of review, except the two freeholders appointed by the judge of the circuit court as authorized by the act of 1895 amending the tax statute of 1891; (2) that appellant, in serving as a member of the board, was only discharging duties imposed upon him as auditor; therefore the per diem allowance for serving thereon must be considered as a fee, which, under the requirements of §§21, 116 and 136, of the act of 1895, (Acts 1895, p. 319, §§6426, 6522, 6540 Burns 1901), should be turned back into the county treasury as a part of the county officers' fund.

While much may be said in support of the first contention of appellant, to the effect that while he was serving as

a member of the board he was not discharging duties *ex officio* as county auditor, nevertheless, we may, *arguendo*, concede, without deciding, the proposition that in acting as a member of the board of review he was serving thereon *ex officio*, and treat the question herein involved in regard to the title to the money from that standpoint or upon that theory, as the ultimate conclusion reached, in our opinion, must be the same, upon either view of the case.

Section 114 of the tax statute of 1891 (Acts 1891, p. 199) provided that: "There shall be an annual board for the review of all assessments and the equalization of the valuation of real and personal property in each county. Such board shall be composed of the county assessor, county auditor and county treasurer. The county assessor shall be president, and the county auditor secretary of said board, which shall be known as the 'County Board of Review'." This section conferred numerous powers upon the board, and exacted of it the performance of numerous duties. The statute provided that before entering upon the discharge of their duties, each member should take and subscribe an oath for the faithful and impartial discharge of his duties as a member of said board. This oath required each member to be sworn to support the federal and the state Constitutions, and faithfully and impartially to discharge his duty as a member of the board of review, and that he would, according to the best of his knowledge and judgment, assess, review, and equalize the assessments of the property of the county, etc. Appeals were allowed from the decisions of the board to the state board of tax commissioners.

The legislature at its session of 1895 (Acts 1895, p. 74, §8532 Burns 1901) amended §114 of the aforesaid tax law, and by such amendment the following provision, which we have embraced in italics, was added to the section: "Such board shall be composed of the county assessor, county auditor and county treasurer, *and two freeholders to be appointed by the judge of the circuit court, who shall each*

be paid out of the county treasury, the sum of \$3 for each and every day while they are acting as members of said board." This amendatory act was approved March 1, 1895, and by virtue of an emergency clause was in full force and effect from and after its passage. The amendatory act prescribed the same oath to be taken by each member of the board, as originally provided; and it substantially invests this body with the same powers, and requires it to perform the same duties, as were originally prescribed, except the provision in regard to its power to punish for contempt of its authority is eliminated from the section as amended. A county board of review, as held by the decisions of this court, is a tribunal said to possess *quasi* judicial powers, and performs extraordinary services. *State v. Wood*, 110 Ind. 82; *Senour v. Matchett*, 140 Ind. 636; *Satterwhite v. State*, 142 Ind. 1.

Under the provisions of the tax law creating the board, three members thereof constitute a quorum for the transaction of business; and it is authorized, when necessary, to sit for twenty days in each year, and in the year when real estate is required to be appraised it may sit for a period of thirty days. The place fixed by the statute for the board to hold its sessions is at the court-house, in the room of the county commissioners. During its sessions the county auditor not only serves as a member thereof, but is also designated by the statute to serve as its secretary. It is claimed that in the discharge of these duties, under the circumstances, he must necessarily be absent from the auditor's office, which, under §7971 Burns 1901, is required to be kept open at all times during business hours. While performing the services enjoined upon the auditor as a member and secretary of the board of review, he must also discharge his duty to the public by keeping the office of auditor open for the transaction of the business thereof. It is insisted that this latter duty, if performed during the sessions of

the board, must, under the circumstances, necessarily be discharged through the agency of a deputy, and the latter must be remunerated out of the pocket of the auditor, as he is allowed nothing under the salary act for deputy hire. Therefore the argument is advanced in support of the justice of the per diem allowance that it is not unreasonable to presume that the legislature took these matters into consideration, and awarded the same to the auditor, as a member of the board, in view of his being required to employ a deputy while attending the sessions of the board, in order that the other and usual duties of his office might be discharged. As to what prompted the legislature to award the per diem to the auditor for services rendered by him as a member of the board of review, we need not stop to inquire, but may content ourselves with the fact that it is expressly declared by the statute in question that each member of the board shall be paid out of the county treasury the sum of \$3 for each and every day while acting as a member thereof. In regard to this feature of the case it may be said in the language of the maxim, *ita lex scripta est*—the law is so written—and must be accepted and enforced accordingly. The contention that if the fee and salary act is so construed as to permit appellant to retain as his own the per diem compensation in question, then such an interpretation of the law will result in doubly compensating him; that is to say, he will be allowed the per diem compensation for acting as a member of the board of review, in addition to the annual salary attached to the office of auditor. This argument is without force in the solution of the question involved, for, had the legislature intended to deny a county auditor the right to the former compensation, it could have easily, by the employment of but very few words in either statute, expressed its will in this respect. The authorities assert that where a person who is the incumbent of a public position is required by law to perform the duties of another position, not incompatible with the first, he, in the absence

of any provision of the law to the contrary, is entitled to receive the compensation attached by law to each of the positions. *State, ex rel., v. Harrison*, 116 Ind. 300; *In re Conrad*, 15 Fed. 641; *United States v. Saunders*, 120 U. S. 126, 7 Sup. Ct. 467, 30 L. Ed. 594; *Mechem, Pub. Officers*, §§859, 863. The first contention of counsel for appellee contravenes the plain provision of §114 of the tax law as amended, and is without support.

We may next inquire if the provisions of the fee and salary law of 1895 have so changed or modified the statute awarding the per diem as to require the auditor, after he has received the amount thereof, to report it and turn the money back into the treasury as belonging to the county, to be credited to the auditor's cost or fund. A solution of this question depends upon an interpretation of the several provisions of that statute, especially §116, which it is claimed controls the question in favor of appellee. The act is entitled: "An act fixing the compensation and prescribing the duties of certain State and county officers, fixing certain fees to be taxed in the offices and the salaries of officers therein named," etc. Acts 1895, p. 319, §6426 *et seq.* Burns 1901. It will be observed that this statute was passed by the same legislature about ten days after that body had enacted the amendment to the tax statute by which the per diem compensation was awarded to the members of the county board of review. The contention, therefore, is that, by reason of the fact that the fee and salary law is the later in course of time, the provisions thereof must be construed and held as having changed and modified the provisions of the amendment to the tax statute so as to require the auditor to tax and charge the per diem allowance provided and awarded him for serving as a member of the board as a fee in favor of the county to be credited to the auditor's costs as provided by §115 of the salary act, and when the same is received by him from the county treasurer, he is, under the provisions of said statute, required to pay the

money into the county treasury as the property of the county. The legislation in regard to county officers is introduced by §21 of the salary act which in terms provides that "The county officers named herein shall be entitled to receive for their services, the compensation specified in this act, which compensation is graded in proportion to the population and the necessary services required in each of said several counties, subject, * * * and they shall receive no other compensation whatever."

Section 115, *supra*, requires county auditors to tax and charge upon proper books the fees and amounts provided by law on account of services performed by said officers, and "The fees and amounts so taxed shall be designated 'auditor's costs,' but they shall in no sense belong to, or be the property of the auditor, but shall belong to and be the property of the county. They shall tax and charge: For copies of all records, for each 100 words, ten cents: For writing affidavits and swearing affiant thereto, twenty-five cents." The further enumeration of services to be performed by the auditors, together with the fees to be charged for the same is continued in this section.

Section 116 reads as follows: "Where the auditor is required by law to perform any service not specially mentioned in this act, for which services the auditor shall be entitled under the law existing before the taking effect of this act, to tax, charge or receive any fee or compensation in his own favor for such service, he shall hereafter tax the amount on account of such service in favor of the county, and the same shall be collected and paid into the county treasury as elsewhere provided in this act."

Section 124 requires the county auditor, together with other officers therein mentioned, to make a quarterly sworn report on the days therein designated specifically showing the amount of fees collected during the preceding three months, and to pay the amount shown by such report to the county treasurer, and take the latter's receipt for the

amount; and the auditor is required to give to the officer filing such receipt in his office a quietus for the amount so paid, and the money so turned over into the county treasury is to be treated as distinct and separate funds, known as auditor's funds, etc.

Section 131 makes it the duty of the auditor, within sixty days from the time any costs are taxed or charged in his office for services performed by him or by the sheriff, to issue fee bills for the same to the sheriff of the county for the collection thereof.

Section 136 declares that the act shall not be so construed as to allow the officers therein named the salaries therein provided, and also the fees required to be taxed, "except as otherwise specified."

Section 138 declares that all laws in conflict with the act are repealed to the extent of such conflict.

All of the provisions of the act in question must be construed together, and harmonized with each other, so far as possible. Sections 21 and 136, when so construed, emphasize and make clear the point that the respective officers named in the act shall not, in addition to their annual salary as fixed, be allowed the fees which are required to be taxed by them for official services performed, as provided under said act; or, in other words, the employment of any constructive method which will result in awarding to the officer such fees as his own, which he is required to tax and charge, is expressly prohibited, except as may be otherwise specified.

Section 138 shows that it was the purpose of the legislature to repeal all other laws in conflict with the provisions of the act, only to the extent of such conflict.

It is certainly evident that the provisions of the statute which fix and allow a per diem to remunerate the members of the board of review for serving thereon authorize each thereof, when his claim for such services has been audited by the board of commissioners, to draw the money from the

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county treasury for his own individual use. Therefore, if the provisions of the per diem law in question have been so changed or modified by some part of the fee and salary law as to require the auditor, after he has drawn the money allowed him under said act from the treasury of the county, to report the amount as a fee collected by him, and turn it back into the county treasury, as provided by §124, *supra*, such change or modification in respect to the disposition of the money must be implied by reason of an irreconcilable conflict between the former statute and some provision or provisions of the fee and salary act of 1895. Repeals or modifications of statutes by implication are not favorably recognized by the law. Therefore, if upon any reasonable ground the provisions of these two independent statutes can be reconciled with each other so as to allow both to stand and operate as enacted, it is the duty of a court, in obedience to the requirements of well settled rules, so to adjudge and hold. There is no provision in the salary law in question which expressly professes either to repeal or modify the per diem provision of the tax statute. Certainly, then, we would not be justified in hastily concluding that the legislature, which at the same session enacted both of these laws, intended, under some provision of the salary act, to require the county auditor to tax and charge the amount which he was allowed for his services as a member of the board of review as a fee in favor of the county, and, when the money was received, to return it to the treasurer as the property of the county. The rule is well affirmed by the decisions of this court that where two statutes, as in the case at bar, are passed at the same session of the legislature, they should be construed together, and if possible each ought to be permitted to stand and be enforced as enacted; and it is only where there exists an irreconcilable conflict or repugnancy between the two acts that a court is authorized to adjudge that the later repealed, changed, or modified the earlier by

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implication. *Shea v. City of Muncie*, 148 Ind. 14, and cases there cited.

It is especially insisted that by virtue of §116, *supra*, the law allowing the per diem to appellant for his services in question is so modified or changed as to deny him the right to retain it as his own after he has legally received it in the first instance. This section, it will be observed, declares that where the auditor is required by law to perform any service not specially mentioned in the law of which it forms a part, for which services he "shall be entitled under the law existing before the taking effect of this act, to tax, charge or receive any fee or compensation in his own favor for such service, he shall hereafter tax the amount on account of such service in favor of the county, and the same shall be collected and paid into the county treasury as elsewhere provided in this act." (Our italics.)

The only provision of the salary law in question to which the clause "as elsewhere provided in this act" can be said to refer is §124, *supra*, in which, as we have seen, the auditor is required to make quarterly reports of the amount of fees collected by him, and pay the same over to the county treasurer. Consequently, under the circumstances, §116 may be treated or construed in the light of or in connection with §124. We may note in our efforts to discover the legislative intent or purpose in making §116 a part of the act of 1895, the fact that it is but a reënactment, letter for letter, of §117 of the fee and salary law of 1891 (Acts 1891, p. 424), from which, with some exceptions, the act of 1895 is apparently framed. The section in controversy was manifestly incorporated into the salary statute of 1891 for the purpose of exacting of auditors affected by that act the duty of thereafter taxing in favor of the county all compensatory fees for services performed by them for persons under laws existing after the taking effect of said salary act. Such fees no longer were to be taxed in favor of the auditors, but were to be taxed in favor of the county, and when collected the amount

thereof was to be turned into the county treasury. Of course this provision of the act of 1891 had no reference to laws thereafter enacted by the legislature, but was simply intended to control the disposition of fees authorized to be taxed and charged under laws then existing. As previously shown, the amendatory act allowing a per diem to members of the board of review was passed but a few days prior to the enactment of the salary law of 1895. The result of the former, after it went into force, which was on the day of its passage, in no manner affected or changed §117, then still in force as a part of the salary law of 1891. That section and the section of the tax statute as amended each stood independently of the other. One operated to allow to each member of the county board of review a per diem compensation, to be received by him in his own right, while the other operated to deny the right of a county auditor to tax and charge as his own any fee prescribed to compensate him for official services performed under laws existing at the time the salary act of 1891 went into effect. Under the circumstances, then, in the absence of any provision in the salary act of 1895 expressly showing that it was the purpose or intent of the later law to change or modify in some manner the provisions of the earlier statute allowing the per diem to the auditor as one of the members of the board, it would be unreasonable to suppose that the legislature incorporated §117 of the act of 1891 into that of 1895, with the intent or for the purpose of changing the tenor and effect of the amendment of the tax statute in so far as it provided a per diem compensation in favor of the auditor for serving, as required, as a member of the board of review. The thing which §116 designates or declares shall be paid into the county treasury when collected by the auditor is a fee authorized to be charged and taxed under existing laws by the auditor for official services performed. Such fees are to be thereafter taxed and charged as prescribed by §115 of the act. To assert that §116, when con-

strued along with §124 of the same act, shows that the legislature intended that the per diem amount awarded by the tax law should be regarded as fees to be taxed and charged by the auditor upon the proper books of his office, and, when the amount of money accruing therefrom is drawn by him from the county treasury, he must report the same and turn it back to the treasury as provided by §124, certainly would seem to lead to an absurdity or impress the statute with an inconsistency. The prime object in construing statutes is to ascertain and carry out the true intent of the legislature. In construing an act a court should not adopt a view which will impute inconsistency or absurdity to the action of the legislative department. Words and phrases employed in the law must be considered in their literal and ordinary signification, and where technical words and phrases are used which have a peculiar and appropriate meaning, these must be understood according to their technical import, unless in so doing the intent of the legislature will be defeated. §240 Burns 1901, §240 Horner 1901; *Mayor, etc., v. Weems*, 5 Ind. 547; *Storms v. Stevens*, 104 Ind. 46; *Stout v. Board, etc.*, 107 Ind. 343; *Massey v. Dunlap*, 146 Ind. 350; *Hockemeyer v. Thompson*, 150 Ind. 176.

By the plain and express language of §124, which, as previously said, is manifestly the provision referred to and intended by §116 under the clause therein, "as elsewhere provided in this act," it is declared to be the duty of the auditor to report and pay over to the county treasury, to become a part of the "auditor's fund, the amount of fees collected during the preceding quarter." We must assume that the legislature advisedly and understandingly employed the words "tax" and "fee" or "fees" in their usual sense, or in accordance with the appropriate and legal meaning of these terms; hence, in the interpretation thereof, we must be guided by and observe the rule to which we have hereinbefore referred. The word "tax," as a verb, when used in respect to fees or costs, is defined to mean "To as-

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sess, fix, or determine judicially, the amount of; as to tax the cost of an action in court." Webster's Int. Dictionary. Anderson's Law Dictionary defines the word to mean, "To assess, adjust, fix, determine; as, to tax the items and the amount of costs in a case."

When the auditor has taxed and charged the fees upon the books of his office as prescribed by §115 of the salary act, he may be said to have assessed and determined the amount of the fees allowed by law in the particular matter in which he has rendered official services. For example, "For copies of all records, for each 100 words, ten cents." "For transferring from land description to lot, each lot five cents." The amount of such fees, among others enumerated in that section, when collected by fee bill or otherwise, must be reported and paid over to the county treasurer as exacted by §124. This latter section does not profess to require him to report and pay over to the county treasurer money accruing otherwise than from the fees of his office. The word "fee," as used in the statute, had at the time of the passage thereof a well defined meaning and import; and to this we must adhere, under the rule previously asserted, unless by so doing the intent of the legislature will be defeated. It, in reason, can not be said that the word "fee" or "fees," as employed in the act in controversy, should be accorded a broader or different meaning than is usually given the term in statutes of a similar character or import as the one in question, so as to require a court to hold that the legislature intended the per diem compensation in dispute to be regarded as a fee to be taxed and charged as such in favor of the county, and thereafter the amount be turned back into the county treasury from which it was received.

Let us examine and ascertain from a proper source what the legislature meant by the use of the term in question. In *Cowdin v. Huff*, 10 Ind. 83, the salary of a judge of the common pleas court was involved. This court in that appeal, in determining the meaning and import of the terms

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"salary," "fees," "per diem allowance," "wages," etc., said: "There are now, and were, at the adoption of our Constitution, at least three modes in use of compensating persons engaged in public service, viz., fees, salaries, and wages. These modes are all different, each from the other; and the difference between them has been immemorially well understood. Fees are compensations for particular acts or services; as the fees of clerks, sheriffs, lawyers, physicians, etc. Wages are the compensation paid, or to be paid, for services by the day, week, etc., as of laborers, commissioners, etc. Salaries are the per annum compensation to men in official and some other situations." In considering the provisions of the Constitution in relation to the methods thereunder of compensating public officers, the court further said: "It does provide, in effect, that judges of the supreme and circuit courts shall be paid by salary. Art. 7, §13. It makes no provision as to the compensation of judges of the court of common pleas. These judges, therefore, might be paid by fees, as are justices of the peace; or by per diem allowance, wages, as were probate judges under the old Constitution; or by salary, as are the present judges of the circuit and supreme courts." See, also, *Board, etc., v. Wasson*, 74 Ind. 133; *Anderson's Law Dict.*, under "fee;" *Bourvier's Law Dict.*, under "fee."

An allowance fixed by law at a definite amount per day, to compensate a person for discharging public duties, certainly can not be regarded as a fee, within the accepted meaning of that term, but falls more properly within the definition of the term wages. As well might the per diem allowance fixed by law to remunerate grand and petit jurors for the services performed by them, or the per diem allowed to county superintendents of schools for their services, be considered as fees, as to regard as a fee the per diem compensation allowed by the statute to members of the county board of review. In the cases of *Board, etc., v. Johnson*, 64 Ill. 149, and *Board, etc., v. Christianer*, 68 Ill.

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455, the court held that a per diem allowance by statute to compensate county superintendents of schools could not be regarded as fees, within the meaning of that word as used in the constitution of that state in respect to public officers. See *Board, etc., v. Reissner*, 58 Ind. 260.

In §21, by which, as previously stated, the legislation in regard to the compensation of county officers is introduced, it will be observed that the term "compensation" is employed three times. It is obvious that the legislature in the first two instances, in using the expression, meant and intended to refer to the annual salaries of the officers in each of the respective counties of the State, for by the express language of the section the compensation meant is disclosed to be that which "is graded in proportion to the population and the necessary services required in each of said several counties." No compensation under the act, other than the annual salary of the officer, is attempted to be graded according to the particular standard declared in the section. That it is the annual salary which is intended by the term in question is further manifested by the fact that immediately thereafter follows a list of all of the counties of the State in which the annual salary of each respective officer mentioned is specified or fixed. For example: "In the county of DeKalb the annual salary * * * of the auditor \$2,500." When the clause therein which declares "and they shall receive no other compensation whatever" is construed along with other provisions, especially §136, it becomes evident that the officers are to receive no other compensation by the way of fees or salary in addition to the annual salary fixed by the act, "except as otherwise specified," as is declared by §136. To accord to the clause in question, standing alone, its literal meaning, and construe it as denying, in effect, the right of the officer, outside of his annual salary,—to be allowed for his own use no other compensation upon any event or under any or all circumstances,

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—would result in rendering the provision incompatible and inconsistent with other provisions of the act. To illustrate: Under §122 a sheriff is allowed to retain all fees which he collects for serving processes from counties other than his own, and by the same section he is allowed for boarding each person lawfully in his custody a per diem compensation of forty cents for such services. Certainly §21 could not be construed so as to deny the sheriff the right to the per diem allowed and received by him for his services in boarding or furnishing food to persons lawfully committed to his custody either upon criminal or civil process. This compensation surely was intended to belong to him, and he could not be required, under the provisions of the salary law, to pay it over to the county treasurer. Other illustrations, under the act in question, might be given, but the above will suffice to sustain what we assert.

We may again repeat that it is evident from an examination of §136, and other parts of the act, that what the legislature intended most emphatically to deny was the right of the county officer to receive, in addition to his salary, the fees required under the law to be taxed and charged and paid into the county treasury. The annual salary of the auditor is not made to depend upon the amount of fees collected and paid into the treasury by that official. §6532 Burns 1901. Hence, under the circumstances, there is no force in the contention that the legislature intended that the per diem allowance for serving on the board of review should be regarded as a fee to be paid over, when received, to the county, in order to aid in making up the auditor's annual salary, for the latter is required to be paid in full out of any money in the county treasury not otherwise appropriated. The statute, under its terms, does not pretend or profess to award to the members of the board of review the per diem therein provided for any particular act or items of service performed, but it is to compensate them

for all acts and duties performed or discharged each day as an entirety, while acting as a member of said board.

We conclude that appellant is entitled to the money involved in this action, and therefore the court erred in overruling the demurrer to the first paragraph of the complaint, and in finding in favor of appellee upon the facts.

The judgment is reversed, and the cause remanded to the lower court.

All concur, except Monks and Dowling, JJ., who dissent.

ON PETITION FOR REHEARING.

JORDAN, J.—Counsel in addition to those who represented appellee at the former hearing have intervened, and, in behalf of appellee petitioned for a rehearing. They contend that according to the grammatical construction the per diem awarded by the amendatory act of 1895 (Acts 1895, p. 74) to the members of the county board of review must be limited to the two freeholders appointed by the judge of the circuit court. The argument is advanced that the relative clause “who shall each be paid,” etc., refers and applies solely to the two freeholders, and consequently they alone, to the exclusion of the other members of the board, are entitled to receive for their services the compensation prescribed by the statute. This contention can not prevail, unless resort be had to a strained construction of the law. In support of the grammatical interpretation or construction for which counsel contend we are referred to Fowler’s English Grammar, 570, where the author says: “Where there are two words in a clause each capable of being an antecedent, the relative refers to the latter.” This grammatical rule as above asserted is not an unvarying one under all circumstances and the application thereof is frequently controlled by punctuation disclosing a different intent. In 23 Am. & Eng. Ency. Law, 369, it is said: “In

accordance with strict grammatical construction, qualifying words and phrases should be confined to their next antecedent, in the absence of punctuation showing a different intent. This rule is frequently of no effect, and, indeed, is so often disregarded that the contrary might seem to be established; but, whatever be the rule, it is subservient to the real purpose of the statute, and qualifying words and phrases may be extended to all parts of the sentence, and even to words in other sections, to effectuate the legislative intention, which is the true end of all rules of construction."

In the appeal of *Fisher v. Connard*, 100 Pa. St. 63, the words of the statute there involved were: "Taxes, charges, assessments, and municipal claims, whose lien," etc. The relative was separated from the series of nouns preceding it by a comma. The contention in that case was that the relative, "whose lien," applied and referred alone to the last antecedent, "municipal claims." This contention the court denied, saying: "Our best judgment is that 'taxes, charges, assessments and municipal claims' in the act of 1867, were all intended as antecedents of the word 'lien,' and if this makes good law, the grammatical construction is not so important."

While it may be said that the grammatical construction of a statute is one of the methods of interpretation, still it is not always the true mode, and must yield to the manifest intention of the legislature, as the grammatical sense and structure of the sentences, and propriety of language therein employed, will not be adhered to if inconsistent with the declared purpose, or if to do so would render the law inconsistent or absurd. *State v. Myers*, 146 Ind. 36, 23 Am. & Eng. Ency. Law, 368.

It appears that the statute in question declares that "Such board shall be composed of the county assessor, county auditor and county treasurer, and two freeholders to be appointed by the judge of the circuit court, who shall each be paid," etc. It will be observed that the relative pronoun

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"who" is preceded by a comma. While, as a general rule, the authorities assert that it may be assumed that the draftsman or framer of a bill for an act of the legislature was versed in the rules of grammar and punctuation, still such presumption is not always a safe one for the guidance of a court in the interpretation of a statute. But in the solution of the question in the case at bar we may apply this rule, and assume that had the draftsman or framer of the act herein involved intended that the relative pronoun "who" was to be understood in the restrictive sense for which counsel contend, the word would not have been preceded by a comma. An inspection of the act as it appears on file in the office of the Secretary of State, as it came from the hands of the legislative and executive departments, discloses that the punctuation of the provisions thereof in controversy correspond with and is identically the same as the punctuation in the statute as printed in the official acts of 1895, on page 75.

The grammatical rule that when a relative pronoun follows its antecedent, and is used in a restrictive sense, the comma should not precede it, is well settled. *Vide* Brown's Grammar of English Grammars, 229; Complete English Grammar (Ind. Series), 194; Lockwood's Lessons in English, 225. In Hill's Elements of Rhetoric and Composition, page 107, it is said: "A relative pronoun with several antecedents should be preceded by a comma." In Lockwood's Lessons in English, the author says: "If the relative pronoun refers to each of a series of nouns it should be separated from the series by a comma." Reading the provision in controversy in the light of these well established principles, and it is manifest that the word "who" was not intended by the draftsman of the act, nor by the legislature in the enactment thereof, to be limited or restricted alone to the noun "freeholders," as its antecedent, but was intended to refer to each of the series of nouns preceding it, namely, county assessor, county auditor, county

treasurer, and two freeholders. The relative pronoun "who," as employed in the act in question, may be said to perform dual functions, serving as a pronoun, and also as a conjunction; being equivalent to the words "and they," etc. The language used is, "who shall each be paid," etc., thereby emphasizing the fact that the per diem prescribed was awarded to each and every one of the members composing the board of review. The word "each" as therein used is a distributive adjective pronoun, and denotes or refers to every one of two or more comprising the whole of the series mentioned. See 10 Am. & Eng. Ency, Law (2d ed.), 392; Anderson's Law Dict.; *Adams Express Co. v. City of Lexington*, 83 Ky. 657-660; Fowler's English Grammar, 298, 543; Century Dict.

Had the legislature intended to limit to the two freeholders the compensation provided, it would, no doubt, have found apt and appropriate language to disclose its intention in that respect, as was done in the act of 1881, wherein it was declared that the county board of equalization should be composed of the board of commissioners and four freeholders, to be appointed by the judge of the circuit court. The positive language used in that act to limit or confine to the freeholders the per diem prescribed was: "And the said freeholders shall receive as a compensation for their services the sum of \$2.50 each per day," etc. At the time of the last-mentioned statute the members of the board of commissioners, under a then existing law, were members of the county board of equalization, and their compensation for serving thereon was fixed at \$3.50 per day. §5823 R. S. 1881. The fact that the compensation of the board of commissioners for serving on the board of equalization had already been fixed and prescribed at \$3.50 per day by the fee and salary act then in force, fully accounts for and explains the reason of the legislature in limiting to the freeholders the compensation of \$2.50 per day, as prescribed in the said act of 1881.

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We do not wish to be understood as intimating that the punctuation of the act in question is a controlling feature in its interpretation, or that the question involved, as to whether appellant was entitled to the per diem, is one which may be said, under the law, to be evenly balanced, for when the word "each", used in connection with the relative "who", is considered, and accorded its proper meaning, it becomes perfectly plain that the per diem in question is by the law awarded to each and every member of the board of review. In passing, we may note that Mr. Bishop in his work on Written Laws, at §78, says that punctuation, in the interpretation of statutes, is not of controlling effect, but seems, the author says, "to have been permitted to turn the scale in an evenly balanced case."

In closing their argument upon the petition, counsel admit that if the statute in question, when properly construed, can not be said to award the per diem not only to the freeholders, but also to the auditor, treasurer, and assessor, "then they are entitled to receive it; otherwise not." This may be said to be virtually a concession on the part of counsel and there is no merit in the proposition advanced and urged for consideration by appellee at the previous hearing, to the effect that if the provisions of §114 of the tax law of 1891 (Acts 1891, p. 199), as amended by the act of 1895 (Acts 1895, p. 74), entitled appellant to receive the per diem therein provided, then by virtue of §116 of the salary act of 1895, a later statute, he was required to return it to the county treasury. The insistence being that §114 was so modified and changed by virtue of §116 of the fee and salary law of 1895 that appellant was not entitled to receive and hold the per diem as his own.

In conclusion we may mention the fact that since the original opinion in this appeal was handed down on January 9th of the present year, placing the construction which we did on the provisions of §114 of the tax law in controversy, the legislature, by an act approved February

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25, 1903 (Acts 1903, p. 51), passed a law whereby §114 of the tax statute of 1891 was again amended; and the provisions of the act as amended in 1895 in regard to the persons constituting the county board of review, and the per diem of the members thereof, were reenacted *verbatim et literatim*. We therefore must regard this act of the legislature, in the absence of any showing therein to the contrary, as fully adopting and giving sanction to the construction or interpretation placed by the court upon the provisions of the act in controversy. *Indianapolis, etc., R. Co. v. Guard*, 24 Ind. 222, 87 Am. Dec. 327; *Hilliker v. Citizens St. R. Co.*, 152 Ind. 86; *Board, etc., v. Conner*, 155 Ind. 484.

The construction of the statute having at least impliedly received the sanction and approbation of the legislative department, we, for this reason in addition to others, are satisfied with the result reached at the former hearing. The petition is therefore overruled.

DISSENTING OPINION.

DOWLING, J.—I find myself unable to agree with the majority of the court in this case, and, in view of the importance of the issue presented, I will briefly state the reasons for my dissent from the prevailing opinion.

Two questions arise upon the record: (1) Did the act of March 1, 1895, (Acts 1895, p. 74) entitle the county auditor to special compensation for his services as a member of the board of review; and (2) if so, did the act of March 11, 1895 (Acts 1895, p. 319) deprive him of it, and require him to pay it into the county treasury? After a careful examination of the subject, I have reached the conclusion that the auditor was not entitled to a per diem allowance for his services as a member of the board of review, and that, even if he had been, his right to receive it was taken away by the later statute. Stated more briefly,

and in its practical form, the question for decision is this: Was the auditor of DeKalb county, in addition to the salary of \$2,500 given him by §38 of the act of March 11, 1895, *supra*, entitled to an allowance of \$3 per day for his services as a member of the said board? The proper determination of the cause calls for a construction of §114 of the act of March 1, 1895, and a ruling upon the effect of the passage by the legislature of the act of March 11, 1895.

Whatever may be the rule in other states, or in other jurisdictions, this court is committed to the principle of the strict construction of statutes regulating the fees, salaries, and compensation of public officers. To entitle the officer to any fee, salary, or compensation, he must be able to put his finger upon the statute allowing it to him. Doubts are to be resolved in favor of the public and against the officer. Constructive services and constructive fees are unknown to the law of this State, and double compensation for official services is not to be tolerated.

It was said by Mitchell, J., in *Board, etc., v. Gresham*, 101 Ind. 53: "There can be no such thing in legal contemplation as an implied assumpsit on the part of a county with respect to the services of county officers. In performing services for the county, the officer and the county stand related to each other precisely as an individual and the officer, the statute regulating fees being the measure of compensation for the one, and the extent of the liability of the other in each case. For services imposed by law upon the officer, which are not specially rendered for the municipality, as a prerequisite to the liability of the county for said service, the officer must show: (1) A statute fixing the compensation for the service. (2) A law authorizing or making the county liable to pay for such services out of its treasury. It is of the highest concern to the public that this should be so; otherwise it would be within the power of one body of county officials to compensate the other county officers out of the public treasury, as a matter of grace and favor,

without limit or restraint! This principle has been recognized in this State from the beginning, and accordingly it has invariably been held that official duties imposed upon a public officer, to which no compensation is attached, must be performed, as all official duties anciently were, gratuitously."

In *Noble v. Board, etc.*, 101 Ind. 127, this court again declared that "It was decided as early as *Rawley v. Board, etc.*, 2 Blackf. 355, and it has been the law ever since, that a county can not be liable for the fees and charges of officers without an express statute on the subject."

Again, in *Board, etc., v. Johnson*, 127 Ind. 238, this court said: "It is well settled that a county auditor can recover only such compensation as the statute allows him, and that he is not entitled to recover compensation for duties performed by him, except where the statute so provides, although the services may be regarded by him and by the board of commissioners as 'extra services' entitling him to 'extra' compensation. We have so often discussed this general question that we decline to again discuss it. * * * For many years the General Assembly has clearly and unequivocally declared its policy to be that no constructive fees shall be allowed upon any pretext to county officers, and this court has uniformly given full effect to that policy."

In determining the question presented by the record in this case, the decisions of the courts of other states are entitled to no weight, unless made under statutes similar to our own. *McFarlan v. State*, 149 Ind. 149.

In this State, no person can hold more than one lucrative office at the same time, except as the Constitution expressly permits. Const., Art. 2, §9.

Guided by these rules, it would not seem to be a difficult task to decide the question whether the appellant, as auditor of DeKalb county, was entitled to \$3 per day while acting as a member of the board of review, in addition to the salary of \$2,500 per year allowed him as such auditor.

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1. Such extra allowance is not given to him by the words of the statute. Section 114 of the act of March 1, 1895, on which appellant's claim to the extra compensation is based, reads as follows: "There shall be an annual board for the review of all assessments and the equalization of the valuation of real and personal property in each county. Such board shall be composed of the county assessor, county auditor and county treasurer, and two freeholders to be appointed by the judge of the circuit court, who shall each be paid out of the county treasury, the sum of \$3 for each and every day while they are acting as members of said board." The assessor, auditor, and treasurer were already salaried officers of the county, whose duties, within proper constitutional limits, the legislature at all times had the power to prescribe, increase, or diminish in its discretion. There was no occasion to provide further compensation for them. But the two freeholders who were to be appointed members of the board could receive nothing for their services unless compensation was given to them by statute, and they were evidently the members of the board who were "each to be paid the sum of \$3 for each and every day while they are acting as members of said board." Not only is this the reasonable and natural construction of the language of the statute, but it is in harmony with the grammatical arrangement of its words. It will be observed that the section reads: "Such board shall be composed of the county assessor, county auditor and county treasurer, *and* two freeholders to be appointed by the judge of the circuit court, who shall each be paid out of the county treasury, the sum of \$3 for each and every day," etc. The interposition of the conjunction "and" between the words "county auditor" and "county treasurer" indicated that as to those officers the sentence was complete. The statute designated them as members of the board and nothing more. The subject of the succeeding clause, introduced by a second conjunction "and", is two freeholders to be appointed by the

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judge of the circuit court, and in the concluding part of the sentence, "who shall each be paid out of the county treasury, the sum of \$3 for each and every day while they are acting as members of said board," the relative pronoun "who" refers exclusively to the two freeholders, and not to the three salaried county officers named in the first clause. If the legislature had intended that the special compensation of \$3 per day should be paid to the three county officers, it would have said: Such board shall be composed of the county assessor, county auditor, county treasurer, and two freeholders, to be appointed by the judge of the circuit court, who shall each be paid out of the county treasury the sum of \$3 for each and every day while they are acting as members of said board.

Resorting to previous acts of the legislature, as we have the right to do for the purpose of ascertaining the meaning of the present statute, we find that the revised statutes of 1881 made the board of commissioners of each county and four freeholders the county board of equalization. The duties of this board were similar to those now performed by the board of review. The law provided that the freeholders on the board should receive the sum of \$2.50 per day for their services while actually employed; but no compensation was given to the members of the board of commissioners beyond the allowance made to them by law as such commissioners. §6397 R. S. 1881.

Again, while the board of review, as created by the act of March 6, 1891, was composed of the county assessor, county auditor, and county treasurer, alone, and its duties were precisely those prescribed for the board of review by the act of March 1, 1895, no compensation whatever beyond their salaries was given to the three officers constituting the board. Not until "two freeholders" were added to the board by the act of March 1, 1895, was any special compensation for any of the members of the board mentioned. As these freeholders were not public officers under salary, they

could not be expected to serve without compensation. The assessor, auditor, and treasurer, each received a salary. Therefore no necessity existed for making to them a further allowance. When the act of March 1, 1895, was passed, they were performing all the duties of members of the board of review, under the act of 1891, without extra pay. Why should an addition to their compensation be made when their labors were divided and lightened by two freeholders who were placed on the board to assist them?

The legislature had the right to impose upon the assessor, auditor, and treasurer new and additional duties, and to require these officers to perform them without compensation other than the salaries already allowed. *Gilbert v. Board, etc.*, 8 Blackf. 81; *Board, etc., v. Blake*, 21 Ind. 32; *Board, etc., v. Johnson*, 31 Ind. 463; *Turpen v. Board, etc.*, 7 Ind. 172; *Noble v. Board, etc.*, 101 Ind. 127; *Sudbury v. Board, etc.*, 157 Ind. 446.

County officers are in many cases required by statute to perform services unconnected with their usual official duties. The technical designation of the county clerk is "the clerk of the circuit court." Const., Art. 6, §2. But in certain contingencies he must call special sessions of the board of commissioners. §7822 Burns 1901. He acts as clerk of the board of canvassers of elections. §6271, *supra*. The clerk, auditor, and recorder are made the trustees for the county library. §4965, *supra*. The clerk, sheriff, and auditor may, under some circumstances, appoint a special judge of the circuit court. §§1444, 1447, *supra*. The county auditor may participate in the election by the township trustees of the county superintendent, and give the casting vote in case of a tie. §5900, *supra*. The auditor must act as the clerk of the board of commissioners. §7825, *supra*. Yet in none of these cases is special compensation made to any of these officers, and in all of them the officer acts in his official character as clerk of the circuit court, sheriff, recorder, or as county auditor. The duty is made an in-

cident of the office. The assessor, auditor, and treasurer were by the act of March 1, 1895, made members of the board of review *ex officio*, and the services to be performed by them were properly added to their existing official duties.

Referring once more to the words of the act of March 1, 1895, creating the board of review, it will be observed that the assessor, auditor, and treasurer are not appointed or elected members of that body by the executive, by the legislature, by the judge of the circuit court, or other public officer, or by the electors of the county. Section 114 provides that the two freeholders shall be appointed by the judge of the circuit court. The three county officers are brought into the board and subjected to the provisions of the act by the words: "Such board shall be composed of the county assessor, county auditor and county treasurer, and two freeholders to be appointed by the judge of the circuit court," etc. None of the duties prescribed by §114 of the act of 1895 was inconsistent with, or essentially different from, the duties required by existing statutes to be performed by the three county officers who were made *ex officio* members of the board of review. Each of them was directly connected with the general revenue system of the county and State. By virtue of his office, each possessed special facilities for the discharge of those public duties which were committed to the board of review. They were the only persons having official knowledge of the subjects to be considered by such board. Had that board been composed of persons other than the assessor, auditor, and treasurer, it could have done nothing without the attendance of these public officers, and the exhibition and explanation by them of the books, papers, and records of their offices. Such attendance could certainly have been exacted as a part of the duty of these officers under the acts in force in 1891 and 1895.

2. If the act of March 1, 1895, gave to the auditor the special compensation of \$3 per day while acting as a member of the board of review, that compensation was taken

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away by the act of March 11, 1895. At the same session of the General Assembly which passed the act of March 1, 1895, creating the board of review, and ten days later, another act was passed entitled, "An act fixing the compensation, and prescribing the duties of certain state and county officers, fixing certain fees to be taxed in the offices and the salaries of officers therein named," etc. Acts 1895, p. 319. Section 116 of this act was in these words: "Where the auditor is required by law to perform any service not specially mentioned in this act, for which services the auditor shall be entitled under the law existing before the taking effect of this act, to tax, charge or receive any fee or compensation in his own favor for such service, he shall hereafter tax the amount on account of such service in favor of the county, and the same shall be collected and paid into the county treasury, as elsewhere provided in this act." The terms of this section are sweeping and admit of no exception. Not only does it require all "fees" for services performed by the auditor to be taxed in favor of the county and paid into its treasury, but it emphatically declares that any compensation for "any service not specially mentioned in this act" which "the auditor shall be entitled under the law existing before the taking effect of this act, to * * * receive * * * in his own favor for such service, he shall hereafter tax the amount on account of such service in favor of the county," etc.

Even if the construction I have placed upon §114 of the act of March 1, 1895, is erroneous, and if the auditor, under the act of March 1, 1895, was entitled to receive as compensation for services as a member of the board of review the sum of \$3 per day while acting as such member, then the case falls precisely within the terms of §116 of the fee and salary law of March 11, 1895. By the act of March 1, 1895, amending the act creating the board of review, the county auditor was required to perform services not specially mentioned in the fee and salary act of March

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11, 1895. That special service was to act as a member of the board of review not more than thirty days in any year. If it be true that as such member the auditor was entitled, under the existing law of March 1, 1895, to the compensation of \$3 per day for that service, then by the express terms of the act of March 11, 1895, that compensation belonged not to him, but to the county. The two acts were passed at the same session of the General Assembly. If the first gives special compensation to the auditor, the second denies it. There is, then, an irreconcilable conflict between them, and the later act must prevail. *Shea v. City of Muncie*, 148 Ind. 14.

Section 21 of the act of March 11, 1895, declares that the county officers named therein,—and the county auditor is one of them,—“shall be entitled to receive for their services the compensation specified in this act * * * and they shall receive no other compensation whatever. Section 38 of the act provides that the auditor of DeKalb county shall have an annual salary of \$2,500. Section 138 repeals all laws and parts of laws in conflict with the act of March 11, 1895, to the extent of such conflict. The act of March 1, 1895, if it gave to the auditor any compensation for special services not mentioned in the fee and salary act, and thereby conflicted with the later act, was, to that extent, repealed.

The act of March 11, 1895, applies not only to the services, fees, salary, and compensation mentioned in it, but it is expressly extended to “any services not specially mentioned in this act, for which services the auditor shall be entitled under the law existing before the taking effect of this act, to tax, charge or receive any fee or compensation.” Language could not be plainer. The evident intention of the legislature was to make the salary of \$2,500, allowed the auditor of DeKalb county, the only compensation to which he should be entitled for any and every kind of official service performed by him. This interpretation of these

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statutes is in harmony with the established policy of the State, which seeks to keep exactions for official services within reasonable bounds, by cutting off extra and specific allowances, and granting to the auditor and other officers salaries carefully adjusted according to the constitutional requirement.

No detriment to the public interests could result from the performance of the additional duties imposed upon the county auditor as a member of the board of review, for the reason that, if that service required his absence from his office, all his other duties as auditor could be discharged by a deputy.

If an attempt is made to justify the allowance of the per diem to the auditor on the ground that membership of the board of review constitutes a separate office, then it may be suggested that the provisions of the Constitution forbid the auditor from holding two lucrative offices at the same time. Const., Art. 2, §9; *State, ex rel., v. Kirk*, 44 Ind. 401, 15 Am. Rep. 239; *Chambers v. State, ex rel.*, 127 Ind. 365, 11 L. R. A. 613.

Without pursuing this subject further, I think it clearly appears that the appellant was not entitled to the \$3 per diem claimed by him, and that the judgment of the DeKalb circuit court should be affirmed.

Monks, J., concurs in dissenting opinion.

ESTATE OF STANLEY v. PENCE.

[No. 19,845. Filed January 27, 1903. Rehearing denied May 22, 1903.]

PLEADING.—*Complaint.*—*Proof.*—*Variance.*—*Claim Against Decedent's Estate.*—The rule that a plaintiff must recover upon the theory outlined by the facts alleged in his complaint does not apply to nor control in the prosecution of a claim against a decedent's estate; since the statute does not require a formal complaint, but a mere statement of the claim. p. 461.

SAME.—*Complaint*—*Proof.*—*Variance.*—A recovery may be had, where there is evidence sufficient to establish substantially the issuable

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161	272
160	636
163	66
160	636
d164	640

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facts constituting the cause of action set out in the complaint, although all allegations of the complaint may not be proved. *p.* 641.

TRUSTS.—Parol.—A trust in personal property or money may be created by parol. *p.* 642.

SAME.—Continuing Trust.—Limitation of Action.—Where a husband receives money from his wife with the understanding that the same is to be paid to the children at the time of his death, or sooner if he chooses to do so, a continuing trust is created, against which the statute of limitations does not run. *pp.* 642-644.

SAME.—Liability of Trustee for Interest on Trust Funds.—Where a husband received money from his wife with the understanding that the same was to be held in trust for her children, and the husband used the money as his own, the children could, at his death, recover from his estate the money with interest at the rate of six per cent. per annum. *p.* 644.

TRIAL.—Instructions.—Burden of Proof.—In an action to enforce a claim against a decedent's estate, it is not reversible error to instruct the jury that the plaintiff is entitled to recover if the material allegations of the complaint are proved by a fair preponderance of the evidence unless the jury were satisfied from the evidence that the defendant had established one or the other of the special answers pleaded, where, by other instructions, the court informed the jury that the burden was upon the plaintiff to prove all material allegations of the complaint. *pp.* 645, 646.

From Madison Circuit Court; *J. F. McClure*, Judge.

Claim by Lutesia Pence against the estate of John H. Stanley, deceased. From a judgment for claimant, estate appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

J. W. Lovett, C. G. Browne, D. W. Wood, W. S. Ellis and *Alfred Ellison*, for appellant.

E. B. Goodykoonts, G. M. Ballard, B. H. Campbell, W. A. Kittinger and *W. S. Diven*, for appellee.

JORDAN, J.—On March 14, 1900, appellee filed in the lower court her formal complaint setting up a claim against the estate of John H. Stanley, deceased. On the issues joined a trial was had by jury, and a verdict was returned in favor of appellee for \$841.93, and over appellant's motion for a new trial judgment was rendered for that amount.

The errors assigned are: (1) Overruling the demurrer to the complaint; (2) denying the motion for a new trial.

The first contention of appellee is that the complaint upon its face discloses that the claim or demand therein sought to be enforced is barred by the limitation statute of six years. The complaint charges that the estate of John H. Stanley is indebted to the plaintiff in the sum of \$1,532 for money received by him from the mother of plaintiff at the times as therein stated. When the money in question was received or obtained by said Stanley from the plaintiff's mother, the latter and he were husband and wife, and the money so received was the wife's own separate property, which she had received from the estate of her father and mother. It appears that \$600 thereof was received by said Stanley from his said wife in the year 1863, and \$300 in the year 1882. It is disclosed that at the time or times Stanley received the money from his wife, he, in order to obtain it from her, agreed with and promised her that if she would let him have the money, the amount so received by him, with interest thereon, should be paid to the plaintiff at the death of said Stanley, and that it should stand and be a claim against his estate, but that he should have the privilege at his option of paying the amount to the plaintiff—appellee herein—in his lifetime. It appears that Stanley received the \$900 in question from the plaintiff's mother upon these conditions, and that he kept and obtained the same and appropriated it to his own use, and at no time during his life did he account for or pay any part thereof to the plaintiff. It is further shown that Stanley died on January 29, 1899, in Madison county, Indiana, leaving said money so received by him due and unpaid to plaintiff.

By the facts as alleged in the complaint it appears that the money in question was not to be absolutely due and payable to the plaintiff until the death of said John H. Stanley. The mere fact, then, that he is shown to have had the privi-

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lege, at his option, of paying the money at any time during life, would not, as insisted by appellant, operate to subject the claim to the six years' statute of limitation.

The following facts appear to be established by the evidence: John H. Stanley died testate on January 29, 1899, at Madison county, Indiana, leaving surviving him, his widow, Mary A. Stanley, who was appointed administratrix of his estate with the will annexed. He was married four times, and left surviving him the following children as the fruits of his first marriage: William and Meredith Stanley and Sallie Clevenger. Mrs. William Childers is the only surviving child of the second marriage. Homer Stanley, Lutesia Pence—appellee herein—and Cleoria Stanley are the three surviving children of his third marriage. The mother of these three latter children was Dona Stanley, formerly Dona Pittsford. Eleven children were born unto her and her said husband, John H. Stanley, but all except four died prior to her death, which occurred sometime during the year 1882. Nancy Stanley, one of the four children who survived her mother, Dona, died in the year 1884, leaving but three of the four surviving, viz.: Homer Stanley, Cleoria Stanley, and Lutesia Pence—the appellee herein. Sometime in 1863 Dona Stanley, the mother of these latter children, received from the estate of her deceased father, William Pittsford, the sum of \$630. During the same year her husband, John H. Stanley, obtained or received this sum of money from his said wife under the promise by him that he would hold it for her children, and would account to and pay the money over to them when they were old enough to take care of it; or, according to his own admissions and declarations, he was to account for the same to these children, and they were to receive it at least at his death. In 1881 appellee's mother, Dona Stanley, received from the estate of her mother the further sum of \$250, and when the administrator of the estate came to pay the money to her, her husband John H. Stanley, requested that the

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money be turned over to him, asserting or stating to his wife that she did not need it. Mrs. Stanley, it appears, stated to him that she did not want him to have the money; that she intended that her own children should have the money. Thereupon it appears the husband stated or promised her that every cent of money received by him from her should go to her children. Under this promise, and upon this condition, it appears that she permitted the administrator of her mother's estate to turn over to the husband her said distributive share of \$250. After the husband had received these respective sums of money, as heretofore mentioned, he repeatedly acknowledged to persons, in effect, that he had received the money from his wife for her children, and that he was holding it for them, and intended to pay it over to them as soon as he thought "they needed it," or when "he got ready." Sometimes he would declare or state in the presence of persons that his wife's children would have to wait until his death, and then the money which he had received from their mother for them would be a claim against his estate. It is disclosed that after he received the aforesaid sums of money he actually used the money by investing it in real estate for his own benefit. At the time he obtained the first money, in 1863, appellee was a small girl, about six or seven years old. There is no evidence to show that her father, at any time after he had received the money in question, denied or repudiated the trust imposed upon him by his wife, but at all times expressly admitted or acknowledged that he had received the money for her children, and was holding it for them. There is no evidence to show that Stanley at any time prior to his death apprised or informed appellee that he had received this money for her, and there is nothing to show that prior to his death she had any knowledge that her said father had received any money from her mother which he was holding for her use and benefit. It is not disclosed that any guardian was appointed for appellee during her minority.

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There is no evidence to prove any express promise on the part of Stanley to pay interest on the money which he received, and the jury in an answer to an interrogatory so find. Therefore counsel for appellant contend that by reason of the fact that appellee failed to prove the promise to pay interest as alleged in the complaint, and also, as they insist, failed to establish that there was an express agreement by John H. Stanley that the money should be due and payable at his death, she has failed to establish the theory upon which her complaint proceeds, and is not entitled to recover in this action; or, in other words, it is alleged that the recovery must be *secundum allegata et probata*. It must be remembered, however, that the money sought to be recovered in this proceeding is presented under the complaint as a claim against the estate of the decedent, John H. Stanley.

Appellee, the claimant, was not required, under the provisions of the statute governing or controlling the settlement of the estate of a decedent, to file a formal complaint, but it was only necessary that she should file a "succinct and definite statement" of her claim, embracing therein such facts as were necessary to constitute a *prima facie* claim against the estate in her favor. In view of or in consideration of this fact we have held that the rule so frequently asserted, to the effect that a plaintiff must recover upon the theory outlined by the facts alleged in his complaint, does not apply to or control the mere statement of a claim filed against a decedent's estate. *Masters v. Jones*, 158 Ind. 647; *Thomas v. Merry*, 113 Ind. 83; *Woods v. Matlock*, 19 Ind. App. 364.

While it is true that appellee did not prove all which she alleged in her formal complaint, nevertheless there is evidence sufficient to establish substantially the issuable facts constituting the cause of action set out in the complaint. This was sufficient. *Terre Haute, etc., R. Co. v. Sheeks*, 155 Ind. 74.

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It is insisted by counsel for appellant: (1) That the amount of recovery is too large; (2) that under the facts a recovery is barred by the statute of limitations. The objection urged against the amount which appellee recovered is based upon the ground that she is not entitled to any interest on the money in dispute. Under the instructions of the court the jury, it appears, allowed six per cent. interest on each amount of the money received, in question, from the time the same was received by Stanley. By so instructing the jury it is claimed that the court erred for the reason, as counsel insist, that Stanley was only the custodian of the money in controversy, and therefore was not liable for interest thereon. The inquiry, under the facts, is as to whether, by receiving the money in dispute, the mere relation of creditor and debtor was created between the husband and the children of his wife, or must he be regarded and treated as receiving and holding it in trust for these children? That a trust in personal property or money may be created by parol is settled beyond controversy by the decisions of this court. *Hon v. Hon*, 70 Ind. 135; *Hunt v. Elliott*, 80 Ind. 245, 41 Am. Rep. 794; *Mohn v. Mohn*, 112 Ind. 285; *Thomas v. Merry*, *supra*; *Haxton v. McClaren*, 132 Ind. 235.

The facts disclose that John H. Stanley, the husband, had children by former marriages, and the desire or intention manifested and expressed by the wife was that the money should be received and held by him for her own children. His declarations, when considered along with other evidence and circumstances in the case, establish that fact. It is evident under the facts that the receiving of the money in question by him was, to say the least, the equivalent of his receiving it to hold or keep it for his wife's children, and this trust he expressly agreed to execute. The transaction, being a matter between husband and wife, is strengthened by reason of this relation, and the confidence which the wife would naturally repose in her husband in

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respect to his carrying out her wishes and desires in regard to the money. It is not essential that technical language or words be used to create a trust; it is sufficient if the intention of the settlor is manifest or made apparent. *Anderson v. Crist*, 113 Ind. 65.

We are of the opinion that under the facts equity will regard and treat Stanley as receiving and holding the money in trust for the children of his wife, and a recovery thereof can be enforced by appellee, as one of them, so far as she is concerned. This is fully sustained by the authorities. *Müller v. Billingsly*, 41 Ind. 489; *Durham v. Bischof*, 47 Ind. 211; *Wyble v. McPheters*, 52 Ind. 393; *Hogshead v. State, ex rel.*, 120 Ind. 327; *Reddick v. Keesling*, 129 Ind. 128; *Ransdel v. Moore*, 153 Ind. 393, 53 L. R. A. 753, and cases cited; *Haxton v. McClaren*, 132 Ind. 235.

Under the facts the trust so created was a direct and continuing one, not cognizable at law, but exclusively within the jurisdiction of equity. Stanley, as it appears, repeatedly acknowledged his trust, and never repudiated or disavowed the same, therefore his holding or claim to the money at no time became adverse to the *cestui que trust*; hence, under these circumstances, the statute of limitations is not available, for the reason that it never began to operate. The position of the trustee not being adverse to the beneficiary, therefore, as between the former and the latter, there can be no limitation of time, unless it is made to appear that there was a clear repudiation or denial of the trust by the trustee, and that notice or knowledge thereof was brought home to the *cestui que trust* or beneficiary, so as to require the latter to act in the premises upon a clearly asserted title upon the part of the trustee. *Raymond v. Simonson*, 4 Blackf. 77; *Ward v. Harvey*, 111 Ind. 471; *Thomas v. Merry*, 113 Ind. 83; *Jackson v. Landers*, 134 Ind. 529; *Parks v. Satterthwaite*, 132 Ind. 411; *Jones v. Henderson*, 149 Ind. 458; Perry, *Trusts* (5th ed.), §§863, 865.

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The general rule that the statute of limitations will bar suits in equity as well as actions at law has well recognized exceptions in a direct and continuing trust, which is the creature of equity, and falls within the latter's sphere or jurisdiction. *Raymond v. Simonson*, *Parks v. Satterthwaite*, and *Jones v. Henderson*, *supra*. It follows that there is nothing in the case at bar to justify the contention that the statute of limitations is a bar to appellee's right of recovery.

The next question is, can the allowance of six per cent. interest on the money from the time it was received be justified? There is evidence to show that Stanley actually used the money in the purchase of real estate for himself, thereby converting it to his own use and profit. Under the circumstances it would be wholly inequitable not to charge him, as trustee, with the legal rate of interest upon the trust funds. As a general rule, in the absence of anything to the contrary, the question of requiring a trustee to pay interest on the trust funds is one which must depend upon the facts and circumstances in each particular case; and where good conscience requires that the trustee be charged with interest, the payment thereof ought to be exacted. *Miller v. Billingsly*, 41 Ind. 489; *Pittsburgh, etc., R. Co. v. Swinney*, 97 Ind. 586.

In fact, it may be asserted that the case at bar falls within that clause of the interest statute which provides that "On money had and received for the use of another, and retained without his consent, interest shall be allowed at the rate of \$6 a year on \$100." §7045 Burns 1901.

We conclude that under the facts it was entirely proper and right for the jury to allow the legal rate of interest on the money in question from the date it was received by Stanley, the trustee, and therefore the court did not err in so advising the jury. There is no error, and the judgment is affirmed.

ON PETITION FOR REHEARING.

PER CURIAM.—Counsel for appellant, in their brief on the petition for a rehearing, argue that the court at the former hearing entirely disregarded the question presented upon the rulings of the court in giving and refusing certain instructions; and for this reason, among others, a rehearing is requested. Counsel state that they relied more for a reversal of the judgment upon the errors arising in the instructions complained of, than upon any other feature in the case. While it is true that the opinion does not, in terms, refer to and pass upon all of the instructions about which appellant complained, nevertheless the entire charge of the court was considered; and we were then, and are still, satisfied that, under what may be said to be the uncontradicted facts established by the evidence in the case, appellant has no grounds, arising out of the refusing or giving of instructions, upon which to base a demand for a reversal of the judgment. The conclusions reached and stated in the court's opinion in regard to the law controlling the case at bar fully disposed of the instructions given and requested relative to the statute of limitations. In fact, it may be said that with whatever error, if any, the charge of the court is impressed, such error is in favor of appellant, and prejudicial alone to appellee. The trial court appears to have fairly and fully advised the jury in regard to the burden which the law cast upon appellee, and also as to what was essential for her to establish by a preponderance of the evidence before she was entitled to recover. The jury was also advised in respect to the defenses interposed by appellant, and what was required by her in order to defeat a recovery for which appellee contended. It is especially insisted that instruction number two is manifestly wrong, because it informed the jury that, if the defendant had established one or the other of her special paragraphs of answer, then the plaintiff could recover on less than a fair preponderance of the evi-

dence. It is true that the instruction in controversy is not skilfully drafted, but nevertheless it is not open to the objections or criticism urged by counsel for appellant. What the instruction purports to inform the jury is not that the plaintiff could recover upon less than a fair preponderance of the evidence if the defendant had established one or more of her defenses, but what the court professed to state to the jury, and what the jury must have understood thereby, was that the plaintiff was entitled to recover if she had proved by a fair preponderance of the evidence all of the material averments of her complaint, unless the jury was satisfied from the evidence in the case that the defendant had established one or the other of her special paragraphs of answer. The court by other instructions thoroughly informed the jury that the burden was upon the plaintiff to prove all of the material facts alleged in her complaint. The instruction in question must be given a reasonable interpretation, and when considered in connection with others comprising the charge of the court, as it must be, it, in reason, can not be said to have misled the jury to the prejudice of appellant.

We have again given the questions involved in this appeal a careful consideration, and are content with the conclusion reached at the former hearing; believing, as we do, that the judgment of the lower court accords both with justice and law.

Petition overruled.

Indiana Trust Co. v. Finitzer.

INDIANA TRUST COMPANY, EXECUTOR, v.
FINITZER.

[No. 19,725. Filed May 26, 1903.]

FRAUDS, STATUTE OF.—*Promise to Answer for Debt of Another.*—*Husband and Wife.*—A wholesale liquor dealer refused to extend credit to a saloon keeper unless the saloon keeper's wife would become responsible. She said, "I am running this business. Send on the goods, and I will be responsible." Thereafter the goods were billed to the wife and charged to her, but the business was conducted in the name of the husband, the license afterward being renewed in his name. *Held*, that the agreement made by the wife was nothing more than a parol promise to answer for the default of her husband, and was void under the statute of frauds. *pp.* 647-650.

PLEADING.—*General Denial.*—*Defenses.*—*Statute of Frauds.*—A defendant in an action on a contract may, under the general denial, show that the contract between the parties was a different one from that set forth in the complaint, or that the agreement was void and that no contract at all was made. *p.* 651.

From Superior Court of Marion County; *Vinson Carter*, Judge.

Action by Indiana Trust Company as executor of the will of Christian Koepper against Susie A. Finitzer. From a judgment for defendant, plaintiff appeals. Transferred from Appellate Court, under §1387u Burns 1901. *Affirmed.*

H. M. Dowling, for appellant.

C. R. Hasely, for appellee.

HADLEY, J.—Complaint by appellant in two paragraphs: (1) For goods sold and delivered at the special instance and request of the defendant, between the dates of October 25, 1895, and March 5, 1896; (2) on an account stated between the parties on the 15th day of March, 1896, and which the defendant then agreed to pay. The defendant answered the general denial. Trial by the court, and a general finding and judgment for the defendant (appellee).

The only assignment is the overruling of appellant's

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motion for a new trial, and the only error complained of is that the decision of the court is not sustained by sufficient evidence and is contrary to law.

Two things are put in issue by the answer: (1) The purchase of the goods by appellee as averred in the first paragraph of the complaint; and (2) the stating of the account and appellee's agreement to pay the same, as averred in the second paragraph.

The record discloses the following undisputed facts: Christian Koepper, appellant's decedent, was, and had been for many years, a wholesale liquor dealer in Indianapolis. John Finitzer, husband of appellee, on October 25, 1895, and for about ten years before, was engaged in the saloon business in the same city, and had from time to time purchased a large part of his supplies from Koepper. His wife (appellee) owned in her own right three or four pieces of real estate, including that occupied by the family and by her husband for his saloon, which two occupancies were in the same building. John Finitzer had fallen behind in his payments for goods to Christian Koepper to the amount of \$1,900, and on the 25th of October, 1895, Koepper, accompanied by his attorney, went out to the Finitzer place for the purpose of securing an adjustment of the account due him. Koepper and his attorney on the one side, and Finitzer and his wife (appellee) on the other, had a conference on the subject and reached an adjustment. In this conference Koepper told appellee that he could not sell John any longer; that John had nothing, and already owed him and others; that the property was all hers, and he would not longer sell to John, but, "if she would be responsible, he would continue to supply John with what stock he wanted," and she replied: "I am running this business. Send on the goods, and I will be responsible." Koepper further told her that he would have to open the account in her name, and her answer was: "Send on the goods, and I will be responsible." As a part of the same arrangement and adjustment,

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appellee borrowed the money, by executing a mortgage on her real estate, and paid Koepper her husband's account in full to that date. Koepper changed the account on his books on that date, and thereafter billed all goods sent to the saloon to Susie A. Finitzer. After the arrangement the license for retailing the liquors was continued and renewed in the name of John Finitzer. John continued to conduct the business, ordered, received, and sold the goods, and made payments thereon, and in all respects carried it on as it had been going before, except that the goods delivered by Koepper at the saloon were marked in the name of appellee. Christian Koepper having died before the trial of the cause, appellee and her husband were both thereby disqualified, and were not, upon appellant's objection, permitted to testify concerning the arrangement and adjustment with the decedent which resulted in changing the name of the consignee of the goods. In all matters relating to the acknowledgment of the debt by appellee and her promise to pay the same, made to the agents of Koepper at subsequent times and out of his presence, there is a sharp conflict in the evidence. Appellant produced the attorney who was present for Mr. Koepper at the October 25th arrangement, whose testimony concerning the same is given in substance above, and which gives rise to the inquiry: Was the trial court justified thereunder in finding for the appellee?

We can not weigh the evidence upon points where it is in conflict, and we must therefore assume, for the court has so found, that appellee did not create a personal liability by acknowledgments or promises subsequently made. The only question, therefore, for decision, is: Does the language exchanged between Koepper and appellee on the occasion of the adjustment of her husband's debt constitute appellee a purchaser of the goods thereafter delivered at the saloon, or a parol promise on her part to answer for the debt, default, or miscarriage of her husband? If the latter, it was invalid. §6629 Burns 1901, and cases there collected. The burden

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rested upon appellant to prove that she was the purchaser. In bargaining with her, on terms of his own suggesting, for the purpose of securing a solvent debtor in lieu of her insolvent husband, it was incumbent upon appellant to show by satisfactory proof that she agreed to and did become a *bona fide* purchaser, and that the arrangement entered into was not a mere fiction for the purpose of charging her as guarantor or as surety for her husband. It is not claimed that appellee in terms agreed to become the purchaser of the goods. The most charged against her is that on being informed by Koepper that he would not longer sell to her husband, but, if she would become responsible, he would continue to supply John—not appellee—with what stock he wanted, she replied: "Send on the goods, and I will be responsible." Her answer was by no means equivalent to saying that she would purchase the goods herself; and her declaration that "I am running this business," or "I am running the business," does not amount to a claim of ownership of the saloon, or of the stock in trade; and there is no evidence that she received in person, or in benefit to her property, any part of the profits or proceeds of the sales subsequently made. Moreover, Koepper informed her that under the arrangement the account would have to be changed from her husband's name to her name. Why did Koepper deem this information necessary, if it was understood that she was to be the *bona fide* buyer? If she was to be the actual purchaser, how else could the account be kept, but in her name? These considerations, associated with the further facts that the husband renewed the saloon license in his own name, and continued to control and carry on the business, in all respects as it had been done before the adjustment, except to receive the goods billed in his wife's name, tend to prove that appellee's agreement was nothing more than a collateral parol promise to answer for the default of her husband; and we therefore think the court had sufficient grounds for finding that she was not the purchaser of the goods.

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Appellee had the right to set up the invalidity of the contract as a defense under her answer of general denial. Under such an answer the defendant may show that the contract between the parties was a different one from that set forth in the complaint, or that the agreement was void and that no contract at all was made. *Jeffersonville Water Sup. Co. v. Riter*, 146 Ind. 521, and authorities there collected.

We have carefully examined all the evidence given at the trial, and have not been convinced thereby that the court erred in its finding and judgment for appellee.

Judgment affirmed.

Dowling, J., did not participate in the decision of this case.

CRYSTAL ICE COMPANY v. MORRIS.

[No. 19,745. Filed May 26, 1903.]

160 651
163 573

APPEAL AND ERROR.—Motions.—Prior to the passage of the act of 1903 (Acts 1903, p. 339), providing that motions to insert or strike out any pleading or parts of a pleading must set forth the words to be inserted or stricken out and the motion and ruling thereon shall be a part of the record without a bill of exceptions, the ruling of the court in sustaining in part and overruling in part a motion to strike out can not be reviewed on appeal, where the motion and the ruling thereon are not brought into the record by bill of exceptions or order of court. *pp. 652, 653.*

LANDLORD AND TENANT.—Lease.—Complaint.—Where property was leased for a period of ten years with the right on the part of the lessee to continue the same for an additional term of ten years on the same terms, with the exception that the rent for the second period of ten years should be \$150 a year instead of \$50 a year, a complaint to recover the first year's rent of the second period of ten years under the lease must show by direct averments, or by facts alleged, that defendant not only continued to hold possession of the leased premises, but that such possession was continued under the terms of the lease. *pp. 653-654.*

From the Superior Court of Madison County; *H. C. Ryan*, Judge.

Action by William R. Morris against the Crystal Ice Company. From a judgment for plaintiff, defendant

appeals. Transferred from Appellate Court, under §1362 Burns 1901. *Reversed.*

M. A. Chipman, S. M. Keltner and E. E. Hendee, for appellant.

F. A. Walker and F. P. Foster, for appellee.

MONKS, C. J.—It appears from the record that appellee was the owner of the real estate described in the complaint, and that he executed a written lease of the same, to be used as an ice pond for a period of ten years from January 1, 1888, for \$50 a year, to be paid the 1st day of July of each year, with the right, on the part of the lessee, to continue the same for an additional period of ten years on the same terms, with the exception that the rent for the second period of ten years was to be \$150 a year, provided the lessor did not “discontinue the use of said real estate as a pond.” The lessee was given the right to erect buildings on said real estate for the storage of ice gathered on said pond, and the right to place machinery thereon for harvesting the ice, and at the termination of said lease to remove any and all buildings and machinery placed thereon.

Appellee brought this action to recover the first year’s rent of the second period after ten years under said lease. Appellant’s demurrer for want of facts to the complaint, which was in one paragraph, was overruled. A trial of said cause by the court resulted in a finding and judgment against appellant. The ruling of the court on said demurrer is assigned for error.

The clerk has copied into the transcript a motion to strike out parts of the complaint, and an entry showing that said motion was sustained in part and overruled in part by the court. It has been held by this court that the ruling of the trial court sustaining a motion to strike out a part or all of a pleading and the motion to strike out are not in the record unless brought in by a bill of exceptions or an order of court. If there is no such bill of exceptions or order of court, there

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is nothing in the record to show that any such motion or ruling was made. *Dudley v. Pigg*, 149 Ind. 363, 369; *State, ex rel., v. Halter*, 149 Ind. 292, 303, 304; *Corbey v. Rogers*, 152 Ind. 169, 170; *Balue v. Richardson*, 124 Ind. 480, 481; *Holland v. Holland*, 131 Ind. 196, 200; *Berlin v. Oglesbee*, 65 Ind. 308, 310; *School Town of Princeton v. Gebhart*, 61 Ind. 187, 197; *Broker v. Scobey*, 56 Ind. 588, 590; *Thomas v. Passage*, 54 Ind. 106, 110, 115; *Greensburg, etc., Turnpike Co. v. Sidener*, 40 Ind. 424, 426; *Manhattan Life Ins. Co. v. Doll*, 80 Ind. 113, 115. After a careful consideration of the question, we adhere to said rule. The rule on this subject was materially changed by the General Assembly at its last session. Acts 1903, p. 339, §§2 and 3. Under §2 of said act all motions to insert or strike out any part or parts of any pleading, deposition, report, or other paper must be in writing, and set forth the words to be stricken out or inserted. This rule is mandatory, and such motion can not be made in any other manner after the taking effect of said act on April 23, 1903. If so made, the motion, ruling of the court, and words to be stricken out or inserted will be a part of the record without a bill of exceptions or order of court under §3 of said act. The motion to strike out in this case was made long before said act of 1903 was passed, and said sections, therefore, do not control or affect the questions presented here. As the motion to strike out parts of the complaint and the ruling of the court thereon are not brought into the record by a bill of exceptions or order of court, they form no part thereof, although copied into the transcript by the clerk. The record does not show, therefore, that any part of the complaint was stricken out, and we are required to consider the same as copied into the transcript. *Dudley v. Pigg*, and other cases cited, *supra*.

No facts showing that appellant had elected to hold the leased premises for the additional period of ten years provided for in said lease were alleged in the complaint, as was done in *Terstegge v. First German, etc., Soc.*, 92 Ind. 82,

47 Am. Rep. 135, and *Kramer v. Cook*, 73 Mass. 550, but only matters admissible in evidence to sustain such allegations were averred. Facts showing that appellant had elected or exercised its option to hold the leased premises for the second period of ten years should have been averred, and it was not sufficient merely to allege matters admissible in evidence to support the same. It is true that there is an allegation that appellant "continued to hold possession of said premises after the 1st day of January, 1898," the time when the first period of ten years expired, but it is not shown by direct averment, or by facts alleged, that such possession was continued upon the terms of said lease. For aught that appears in the complaint, such possession may have been under another agreement, and not under said lease.

It is clear that the court erred in overruling the demurrer to the complaint. Judgment reversed, with instructions to sustain the demurrer to the complaint.

GIFFORD v. BOARD OF COMMISSIONERS OF JASPER
COUNTY ET AL.

[No. 19,887. Filed May 26, 1908.]

CERTIORARI.—*Free Gravel Roads.*—A writ of *certiorari* will not lie to review the proceedings of the board of commissioners in the establishment of a free gravel road on the petition of a remonstrant alleging in his petition that the petition for the construction of the road was not signed by the requisite number of qualified freeholders.

From Jasper Circuit Court; *S. P. Thompson*, Judge.

Petition by Benjamin J. Gifford to review by writ of *certiorari* the proceedings of the board of commissioners in a gravel road proceeding. From an order of court denying the petition, petitioner appeals. *Affirmed.*

B. F. Ferguson and *J. E. Wilson*, for appellant.

Frank Foltz, *C. G. Spittler* and *H. R. Kurrie*, for appellees.

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MONKS, C. J.—On May 7, 1900, two petitions for the construction of a free gravel road on the same highway under the act of 1885 and the acts amendatory thereof and supplemental thereto (§§6879-6889, 6891-6899 Burns 1894) were presented to the board of commissioners of Jasper county. Said petitions were heard as one proceeding, and the cause continued until the next term of the board. At the June term the petitions were taken up and considered, and, no objection being made thereto by any person, the board heard the evidence, and found that due notice had been given more than ten days before the first day of the May term, 1900, of said board, by posting as required by law, and that said petitions were signed by a majority of the landowners of the said county, whose lands were within two miles of the proposed improvement; that the kind of improvement prayed for, and the points between which it was proposed to construct said gravel road, were sufficiently described, and that viewers thereon should be appointed as provided by law. The board thereupon appointed viewers and an engineer, and took all the steps and made all the orders provided for and required in §6880 Burns 1894 (Acts 1893, p. 155). The report of the viewers and the engineer was filed July 5, 1900, and notice given that the cause would be heard by the board August 7, 1900, as required by §6882 Burns 1894. Benjamin Gifford, the appellant in this cause, on August 7, 1900, entered a special appearance to the said action, and objected to the sufficiency of the notice of the presentation of said petition, which objection was overruled by the board. He then protested against the action of the board upon the ground that the board did not have jurisdiction of the said cause. Said Gifford and another then filed separate remonstrances. Upon the hearing of the report and the remonstrances, the board found against the remonstrants, and made the findings and orders provided for in §§6883-6885 Burns 1894. From this order Gifford appealed to the Jasper Circuit

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Court, where the cause was tried *de novo*. The objection and motions made by said Gifford before the board of commissioners were renewed in the circuit court, and overruled. The appellant also attempted to file a plea in abatement, but was denied the privilege. The cause was tried by a jury, and a verdict returned in favor of the petitioners for said improvement, and against the remonstrants. The court rendered judgment on said verdict, confirming and approving the benefits assessed, and that said improvement be made under said act as prayed for in the petition. The cause was then appealed by said Gifford to this court, where the judgment of the court below was affirmed. *Gifford v. Baker*, 158 Ind. 339. While said appeal was pending in this court appellant filed his petition against the appellees in the court below, alleging that the petition for the construction of said free gravel road was not signed by a majority of the resident landowners of the county whose lands were within two miles of the proposed improvement, as alleged in said gravel road petition, and found by the board of commissioners, and sought to review the action of the board of commissioners as to said finding of fact by writ of *certiorari*. It was also alleged in the petition filed in this proceeding that the petitioner had no knowledge of said proceeding until notice was given of the time of hearing the viewers' report, and that he had "used all the means in his power to get a hearing on these questions, and due diligence." Appellees' demurrer for want of facts was sustained to said petition, and final judgment was rendered against him.

The only method provided in the statutes of this State for the superior courts to review the action of an inferior court is by appeal. If a writ of *certiorari* may be issued by a superior court to an inferior court for the purpose of reviewing the action of such inferior court, it is by virtue of the common law, for the reason that the statutes of this State make no provision therefor. It is insisted by the appellees that the courts of this State have no power to issue

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writs of *certiorari* for such purpose. The writ of *certiorari* was not a writ of right at common law, but was known as a discretionary writ. Not an arbitrary discretion, but a sound judicial discretion. Bouvier's Law Dict. (Rawle's ed.), title *Certiorari*, 302; Elliott, Roads & Sts. (2d ed.), §373; Harris, *Certiorari*, §§2, 3, 14, 55; 4 Ency. Pl. & Pr., 31, 33, 107; Note to *Duggen v. McGruder*, 12 Am. Dec. 530. As a general rule the writ will not be granted to review a proceeding where the right of appeal exists. *Davis County v. Horn*, 4 G. Greene (Iowa) 94; *McCrorry v. Griswold*, 7 Iowa 248; *Savage v. Gulliver*, 4 Mass. 171, 178; Note to *Wulzen v. Board, etc.*, 40 Am. St. 30; Bouvier's Law Dict. (Rawle's ed.), title *Certiorari*, 301, 302.

In Elliott, Roads & Sts. (2d ed.), §372, it is said concerning writs of *certiorari*: "There is much conflict among the cases as to what can be accomplished by *certiorari*, and it is by no means easy to extract a satisfactory conclusion from them. By some of the courts it is held that the question of damages must be tried on appeal and can not be tried on *certiorari*. Other courts hold that the revisory court can do no more than consider the question of the jurisdiction of the inferior tribunal. There are other courts which hold that all errors of law may be reviewed. In other cases the holding seems to be, that where there is no remedy by appeal all questions may be reviewed, but where there is such a remedy the only question that will be considered is that of jurisdiction. It is generally agreed that *certiorari* lies only to correct errors of law, and not to review the evidence, but even here there is diversity of opinion, for some of the cases hold that the court may inquire on *certiorari* whether there was any evidence of a fact, and this inquiry, it is obvious, can not be made without a review of the evidence. The truth is that the office of a *certiorari* has been so much enlarged by the desire to make it fit particular cases, by some of the courts, that it has lost its original character, and

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has become the offspring of a usurped power, for the courts which have so enlarged the office of the writ have supplanted legislation by a creature of their own." ' .

It will be observed that notice in the gravel road proceeding had been given as required by law, and the board had found and adjudged that proper notice had been given, and that the petition had been signed by the proper number of qualified persons, and appointed the viewers provided for in said act, and the viewers had filed their report; that on the day fixed for the hearing of the said report, appellant appeared for the first time and made the objection that the petition was not signed by the proper number of qualified persons. The petition did not show that it was not signed by the proper number of qualified freeholders, but on the contrary it was alleged therein that it was signed by the proper number as required by the statute, and the board had so found and adjudged. The statute invests boards of commissioners with general and exclusive original jurisdiction of proceedings for the construction of free gravel roads, and this court held in said cause on appeal (*Gifford v. Baker*, 158 Ind. 339) that appellant, not having appeared before the board and made his objection before the appointment of the viewers, was conclusively bound by the finding and judgment of the board on that question, and could not thereafter make said objections before the board, or in the circuit court on appeal. It has been uniformly held by this court in proceedings under said gravel road law and other laws of like character before the board of commissioners that any interested party may appear and contest questions as to notice, and whether the petition was signed by the number of persons possessing the qualifications required by such laws, and if such objections were not made before the appointment of the viewers, they could not be made afterwards, either before the board or in the circuit court on appeal. *Gifford v. Baker*, *supra*, and cases cited; *Miller v. Burks*, 146 Ind. 219, and cases cited; *Evans v. West*,

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138 Ind. 621, 623-625; *Robinson v. Rippey*, 111 Ind. 112, 119; *Osborn v. Sutton*, 108 Ind. 443, 446, 447, and cases cited; *Wilkinson v. Lemasters*, 122 Ind. 82, and cases cited; *Forsyth v. Wilcox*, 143 Ind. 144, 147-150, and cases cited; *Irwin v. Armuth*, 129 Ind. 340; *Washington Ice Co. v. Lay*, 103 Ind. 48, 51, 52; *Forsythe v. Kreuter*, 100 Ind. 27, 29, and cases cited; *Breitweiser v. Fuhrman*, 88 Ind. 28, 29; *Green v. Elliott*, 86 Ind. 53, 57-66, and cases cited; *Wright v. Wells*, 29 Ind. 354, 356-358; *Little v. Thompson*, 24 Ind. 146, 150.

It was said in *Forsyth v. Wilcox*, *supra*, at page 147: "It is the settled law of this State that questions as to the qualifications of the petitioners, the sufficiency of notice, the formal averments of the petition, and other questions of like character, are waived by the failure of a remonstrant to raise them before the board; that the judgment of the board as to the sufficiency of notice is final, and that only such questions as have been affirmatively put in issue before the board, or such as may be permitted by amendment on appeal, may be tried in the circuit court. The case of *Green v. Elliott*, *supra*, fully considers the doctrine of waiver, and cites many decisions in this State supporting its conclusions. In the appellant's case, *Forsythe v. Kreuter*, *supra*, the court said: 'It is settled by the decisions of this court that nothing can be tried on appeal from the board of commissioners to the circuit court except what is put in issue before the board; and it is equally well settled that objections can only be taken to facts upon which the jurisdiction of the board depends, by appearing before the commissioners and making such objections at the time the petition is presented, and before the appointment of the viewers. Whether the petition was signed by twelve freeholders, six of whom resided in the immediate neighborhood, etc., was jurisdictional, and the finding of the commissioners on that subject was conclusive.' "

In *Little v. Thompson, supra*, the court said in regard to the jurisdictional questions: "The time for this inquiry, then, precedes the appointment of viewers. It can not be made afterward, and it must be made at that time, whether anyone appears to raise the objection or not. If anyone should appear at the time the petition is presented, and raise the objection, we think he might do so, and produce evidence touching the question of jurisdiction, without a plea in abatement. If the objection is not made at that time, the finding and judgment of the board upon that subject, entered of record, is in such a case conclusive upon it." This language was quoted with approval in *Gifford v. Baker*, 158 Ind. 339, 343.

In *Osborn v. Sutton, supra*—a gravel road proceeding—nine persons interested appeared before the board, before the committee appointed to make the assessment had reported, and moved the court to dismiss the petition because the petition was not signed by a majority of the resident land-owners. In deciding the question it was said by the court: "The objection that the petition was not subscribed by the requisite number of freeholders, can not be successfully made after the board of commissioners has adjudicated that question. It was adjudicated in this case after notice to the appellants, and it was too late to present the objection that there was not a sufficient number of qualified petitioners, after the report of the viewers had been approved and the committee appointed."

Where notice of the presentation of the petition has been given by posting, as required by law, as in this case, all parties interested must, at their peril, give attention to the proceedings which ensue under the statute in such cause; and if any party has no actual knowledge of such proceeding from the legal notice given until after the viewers are appointed, this, as held in the cases cited, gives no cause for allowing him to object to matters which were determined

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and adjudicated by the board before the viewers were appointed. *Adams v. Harrington*, 114 Ind. 66, 72.

If the objection that the petition was not signed by the requisite number of qualified freeholders can not be successfully made after the finding and judgment of the board on that question and the appointment of the viewers, either before the board of commissioners or in the circuit court on appeal, and such finding and judgment is final and conclusive, as held in the cases cited, it is clear that the same can not be reviewed by *certiorari*.

It is evident under the many decisions of this court as to the conclusive effect of such finding and judgment of the board when such objections are not seasonably presented, that judgments of the board of commissioners in such proceedings can not be successfully assailed unless absolutely void, in which case the remedy is by injunction.

It follows that the finding and judgment of the board of commissioners mentioned in this case can not be reviewed by writ of *certiorari*. As to the power of courts to issue such writs to review the actions of inferior courts in cases other than the class here involved, we express no opinion.

Judgment affirmed.

STARR v. THE STATE.

[No. 19,899. Filed May 26, 1903.]

CRIMINAL LAW.—*Assault and Battery.—Felonious Intent.*—Where in a prosecution for assault and battery, with intent to commit murder, the evidence showed that defendant, without provocation, attacked prosecuting witness with a hatchet, inflicting a dangerous wound on his head and face, the jury were authorized to infer that the assault was made with felonious intent. p. 664.

SAME.—*Different Offenses.—Instruction.*—No error was committed in instructing the jury in a prosecution for an assault and battery with intent to commit murder that if they found from the evidence beyond a reasonable doubt that defendant committed an assault and battery on the prosecuting witness with intent to commit murder in the first degree, or with intent to commit

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murder in the second degree, or with intent to commit manslaughter, or an assault and battery only, it would be their duty to find him "guilty as charged" where the instruction fully advised the jury as to the penalty to be inflicted and the form of their verdict in case of a conviction of either offense stated. pp. 665, 666.

CRIMINAL LAW.—Instruction.—Harmless Error.—Alleged error of court in explaining to the jury in an instruction the premeditated malice which is a necessary ingredient of murder in the first degree, and of an assault and battery with intent to commit that crime, and the unpremeditated purpose to kill which enters into the crime of manslaughter, and into an assault and battery with intent to commit that offense, was not prejudicial to defendant, where he was convicted of assault and battery with intent to commit manslaughter. p. 666.

SAME.—Assault and Battery.—Instruction.—Self-Defense.—An instruction in a prosecution for assault and battery with intent to commit murder, that one who provokes, or voluntarily enters into a combat, may not avail himself of the excuse of self-defense, unless he first withdraws from the combat which he has brought on, was not erroneous, where it was authorized by the evidence. pp. 666, 667.

TRIAL.—Instructions.—Verbal Inaccuracies.—A cause will not be reversed because of the mere verbal inaccuracy in a sentence of an instruction, where the error was fully corrected and the meaning of the instruction made clear by the sentence following. pp. 667, 668.

SAME.—Requested Instructions.—Failure to Sign.—Available error can not be predicated on the refusal of the court to give certain instructions to the jury, where the requested instructions were not signed by the party offering them or by his attorney. p. 668.

CRIMINAL LAW.—Evidence.—Res Gestae.—Where, in a prosecution for assault and battery with intent to commit murder, it appeared that defendant simultaneously assaulted the prosecuting witness and his brother with a hatchet, it was not error to permit a witness to testify that just after the assault he saw the brother lying on a snow drift, alongside the road, with a gash somewhere upon him, and the prosecuting witness, with a cut on his temple, standing between him and their buggy. pp. 668, 669.

SAME.—Evidence.—Proof, in a prosecution for assault and battery with intent to commit murder, of a declaration made by defendant just prior to the assault, while driving along the highway behind the prosecuting witness and his brother, that "he would kill the son of a bitch," was not improper because no person was designated as the object of the threat. p. 669.

From Wells Circuit Court; *E. C. Vaughn*, Judge.

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Richard Starr was convicted of an assault and battery with intent to commit manslaughter, and he appeals. *Affirmed.*

Levi Mock, John Mock, George Mock and W. H. Eichhorn, for appellant.

C. W. Miller, Attorney-General, *C. C. Hadley* and *W. C. Geake*, for State.

DOWLING, J.—This is an appeal from a judgment upon an information for an assault and battery with intent to murder.

The error assigned is the ruling of the court denying appellant's motion for a new trial. The grounds of that motion discussed here are: (1) The supposed failure of the evidence to sustain the verdict; (2) misdirection of the jury by the court; (3) the refusal of the court to give instructions asked for by the appellant; (4) the exclusion of competent and material evidence offered by the appellant; and (5) the admission of incompetent testimony on behalf of the State.

The only point made upon the evidence is that there was no proof of a felonious intent. Briefly stated, the facts were as follows: The prosecuting witness, William Rebelskey, and his brother Otto, were rig builders in the oil fields. The appellant and David Feters were employed by them as laborers, and on the day the assault occurred the four had been at work in the forenoon at a place one and one-quarter miles north of the town of Mt. Zion. At noon all of them went to this town and remained there until about 4 o'clock. The entire party was drinking, and they had some trouble there; Otto Rebelskey knocked Feters down twice. The two Rebelskeys, in a buggy, started for the town of Montpelier, some nine miles distant, and when about two and one-half miles from the town of Mt. Zion they were overtaken by the appellant and Feters, who were in another buggy. The latter drove up behind the Rebelskeys, and the appellant said to Otto, "You haven't got anything against

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me, have you?" Otto said, "No." The appellant then got out of his buggy and started toward Otto Rebelskey who also alighted. The appellant brought from his buggy a hatchet owned by Feters, and struck Otto Rebelskey with it on the head or neck, the injured man falling to the ground. The prosecuting witness, who remained in his buggy, then said to the appellant, "Not strike my brother again; that you will kill him." The appellant thereupon went to the buggy where the prosecuting witness was sitting, and struck him on the temple with the cutting edge of the hatchet, inflicting a severe wound. The appellant returned to his buggy, and drove off leaving the two wounded men in or alongside the road. The appellant and Otto Rebelskey were large men. The prosecuting witness was a small man, being five feet two and one-half inches in height, and weighing 130 pounds.

It appears from the proof by the State that the appellant, without provocation, attacked the prosecuting witness with a hatchet, inflicting a wound upon his head and face which laid him up for several weeks. The manner of the attack, the weapon used, and the location and character of the wound were such that the jury were fully authorized to infer that the assault was made with the felonious intent charged. *Newport v. State*, 140 Ind. 299, 305; *Murphy v. State*, 31 Ind. 511.

Instructions numbered one, two, seven, eight, nine, twelve, and thirteen, given by the court, are complained of, and we are asked to review them. That part of the first instruction which is objected to is in these words: "If you find [from] the evidence beyond a reasonable doubt that the defendant * * * did then and there unlawfully commit an assault and battery upon the prosecuting witness with the intent to commit a felony,—that is, with the intent to commit murder in the first degree, or with the intent to commit murder in the second degree, or with the intent to commit manslaughter,—or an assault and battery only, it will be your

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duty to find him guilty as charged. In case you find him guilty of a felony, under the present law, you will have nothing to do with the fixing of the penalty: that is fixed by the court. If you should find the defendant guilty of an assault and battery, there are two forms of verdict, either of which you may return, as in your judgment you deem just. One is, you may assess a fine in any sum not to exceed \$1,000, and the other is, that you may assess a fine not to exceed \$1,000, to which you may add imprisonment in the county jail not to exceed six months." Counsel for appellant say that this instruction "tells the jury that if they find the defendant guilty of an assault and battery with the intent to commit an assault and battery only, they should find him guilty of an assault and battery with the intent to kill." We can not commend the form of the instruction, but its deficiency in the respect pointed out is not such as to require a reversal of the judgment. Whether the jury found the appellant guilty of an assault and battery with a felonious intent, or guilty of an assault and battery only, it was proper for them to return in their verdict that they found him guilty of the offense proved "as charged." An assault and battery was as distinctly charged in the information as were the higher grades of the felony mentioned in the information. If found guilty of the misdemeanor only, the appellant would necessarily have been found guilty as charged. He could not have been found guilty of an offense with which he was not charged. The next two clauses of the instruction removed all doubt concerning the meaning of the court. They informed the jury that, if they found the appellant guilty of a felony, they would have nothing to do with fixing the penalty for the offense. But, if they found him guilty of an assault and battery only, they might assess a fine not exceeding \$1,000, and, in their discretion, add imprisonment in the county jail not exceeding six months. It is also to be noted that in this instruction the several degrees of assault and battery with intent to kill, as

well as the inferior offense of an assault and battery, were clearly defined by the court. It was impossible that a juror of ordinary intelligence should have been misled in the particular referred to by the language of this instruction. *Sutherland v. State*, 148 Ind. 695.

The second instruction is objected to for ambiguity and uncertainty. It was, however, merely an amplification of the subject of the first, and was intended to explain the difference between the premeditated malice, which is a necessary ingredient of murder in the first degree and of an assault and battery with an intent to commit that crime, and the unpremeditated purpose to kill which enters into the crime of manslaughter and into an assault and battery with intent to commit that offense. These explanations were necessary and proper to enable the jury to understand the nature of the charge contained in the information, and were sufficiently clear for that purpose. It is also to be observed that, as the jury found the appellant guilty of the specific offense of assault and battery with the intent to commit manslaughter, they could not have been led into error by the court. If the objection now taken to the instruction was well founded, it would not be sufficient to reverse the judgment, for, if the language of the court was ambiguous, the appellant should have tendered a further instruction making its meaning more certain. *Baltimore, etc., R. Co. v. Conoyer*, 149 Ind. 524; *Crum v. State*, 148 Ind. 401.

Instruction numbered seven stated that if the appellant was engaged in a combat with the two Rebelskeys at the same time, and upon the first assault by one of them with his fists only the appellant used a deadly weapon on both, the use of such weapon without withdrawing or attempting to withdraw from the contest was not excusable. The only infirmity in this instruction pointed out by counsel for appellant is that it required a withdrawal or an attempt to withdraw from the contest both with Otto Rebelskey and the prosecuting witness. It is insisted that this duty to with-

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draw from the contest should have been confined by the court to the combat with the prosecuting witness alone. The circumstances proved seem to justify the language used. The attack was a joint one upon the prosecuting witness and his brother Otto, and a withdrawal from it necessarily required a withdrawal as to both.

The eighth instruction was authorized by the evidence, and properly stated that one who provokes, or voluntarily enters into, a combat may not avail himself of the excuse of self-defense, unless he first withdraws from the contest which he has brought on. It may also be observed that, even if erroneous, the appellant could not have been harmed by this instruction, because there was no attack whatever upon him, he being the sole aggressor. *Braxton v. State*, 157 Ind. 213.

Instruction number nine was supplemental to number eight, and correctly stated that one may not provoke an attack for the purpose of obtaining an excuse for killing an adversary. *Harmon v. State*, 158 Ind. 37.

The twelfth instruction is not objectionable on the ground that it withdrew from the consideration of the jury the evidence of a previous quarrel between Fetters, the companion of the appellant, and Otto Rebelskey, the brother of the prosecuting witness, on the day of the alleged felonious assault by the appellant upon the prosecuting witness. Fetters took no part in the subsequent difficulty in the road, which resulted in the wounding of the prosecuting witness, and he was in no way connected with it.

The court said in the thirteenth instruction: "There has been some evidence tending to show that the defendant was intoxicated at the time of the commission of the offense complained of. It is proper for you to consider this evidence in determining whether the defendant, in view of his intoxication, *had sufficient mental power to kill*. I instruct you that, although he may have been intoxicated, if he had *sufficient mental power to form an intent to kill*, and committed

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the act in manner and form as charged, his intoxication would not excuse him, or constitute a defense to a charge of assault and battery with intent to kill." The verbal inaccuracy in the sentence "had sufficient mental power to kill" was fully corrected and the meaning of the instruction made clear by the sentence following.

The refusal of the court to give the instructions asked for by the appellant, including number twenty-five, was not erroneous. The instructions requested were not signed by appellant, nor by his attorney, as required by the statute fixing the rule of practice in such cases, which reads thus: "If * * * the defendant or his counsel desire special instructions to be given to the jury, such instructions shall be reduced to writing, numbered and signed by the party or his attorney asking them, and delivered to the court before the commencement of the argument." §1892, clause 6, Burns 1901.

In *Glover v. State*, 109 Ind. 391, it was said: "The instructions do not appear to have been so signed, and hence we can not disregard the contention of counsel for the State, without disregarding the statute and former decisions by this court based upon and construing the statute. §§533, 1823 R. S. 1881; *Chicago, etc., R. Co. v. Hedges*, 105 Ind. 398; *Hutchison v. Lemcke*, 107 Ind. 121; *Beatty v. Brummett*, 94 Ind. 76."

We find no error in the refusal of the court to permit the appellant to introduce evidence of things said and done at the town of Mt. Zion some hours before the assault occurred. They were remote in time and place, and had no apparent connection with the subsequent encounter between the appellant and the prosecuting witness.

Over the objection of the appellant, the court permitted Robert Murray to testify that he saw the two Rebelskeys just after the cutting, Otto lying on a snowdrift alongside the road with a gash somewhere upon him, and the prosecuting witness standing between Otto and their buggy, with

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a cut on his temple. So much of this evidence as related to Otto Rebelskey, counsel for appellant say was incompetent. We think the evidence was properly admitted. It was a necessary part of the description of the situation as it appeared a few moments after the cutting. The wounding of the two men by the appellant occurred in the same encounter, was done with the same weapon, and was almost simultaneous. While the attack upon each may have constituted a separate offense, the cutting of each of the injured persons was in one and the same transaction, and constituted a part of the *res gestæ*.

Proof of the declaration of the appellant, after he left town, and was driving along the highway behind the two Rebelskey brothers, that "he would kill the son of a bitch", was not incompetent because no person was designated as the object of the threat. Considered in connection with the other evidence in the case, it was a question for the jury to determine whether it referred to one of the Rebelskey brothers, whom he attacked and wounded with a hatchet a few moments later. *Parker v. State*, 136 Ind. 284; *Wheeler v. State*, 158 Ind. 687.

We find no error. Judgment affirmed.

STATE, EX REL. WYATT, v. BAGBY ET AL.

[No. 19,961. Filed May 28, 1903.]

EXTORTION.—*Officers.—Action on Bond.*—An action on the bond of an officer for extortion will not lie under §8549 Burns 1901, since such section creates only a personal liability.

From Allen Circuit Court; *J. H. Aiken*, Special Judge.

Action by the State on the relation of Jacob Wyatt against Albert L. Bagby and others. From a judgment for defendants, relator appeals. Transferred from Appellate Court, under §1387h Burns 1901. *Affirmed*.

W. C. Geake and *W. N. Ballou*, for appellant.

Wilmer Leonard and *Elmer Leonard*, for appellees.

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GILLET, J.—Appellant brought this action on the official bond of appellee Bagby to recover a penalty for an alleged act of extortion. It is stated in the brief of appellant that the action is instituted under the provisions of §8, Acts 1883, p. 48, §6549 Burns 1901. The act of March 31, 1879 (Acts 1879, p. 130), which relates to the fees of constables for mileage in the service of process, was amended by the act of March 8, 1897. (Acts 1897, p. 217, §8060 Burns 1901), and therefore we assume that if the section of the act of 1879 relative to a civil penalty for extortion was not repealed by implication by said §8 of the act of 1883, it is nevertheless true that the latter section is the only statute which is broad enough to authorize the recovery of a penalty for the act of extortion charged, if it amounts to an extortion. The section last mentioned creates only a personal liability on the part of the officer, and therefore an action on his bond will not lie. *State, ex rel., v. Souder*, 14 Ind. App. 472. See *State v. Flynn*, 157 Ind. 52.

Judgment affirmed.

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[No. 20,019. Filed May 28, 1903.]

BILLS AND NOTES.—*Agreement to Use for Special Purpose.*—*Breach of Agreement.*—*Principal and Surety.*—Where defendant executed as surety two promissory notes under an agreement with the principal and payee thereof that the notes should be given in payment of certain articles purchased of payee, and such notes were applied to a different purpose, without the knowledge of the surety, the surety waived his right of defense thereto by executing new notes in renewal of the old ones with a knowledge that the old notes had not been used for the purpose for which they were executed. pp. 671-677.

APPEAL AND ERROR.—*Record.*—*Bill of Exceptions.*—*Instructions.*—A bill of exceptions purporting to embrace the instructions can not be regarded as a part of the record where it is not shown that it was ever filed with the clerk or in court after it was signed by the judge. p. 677.

SAME.—*Record.*—*Original Bill of Exceptions.*—*Instructions.*—Instructions embodied in an original bill of exceptions embracing the evi-

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dence which is certified upon appeal without copying can not be considered as a legitimate part of such bill. *pp.* 677, 678.

From Laporte Superior Court; *H. B. Tuthill*, Judge.

Action by William H. Donly against John Baut and another on promissory notes. From a judgment for plaintiff, defendant John Baut appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

C. R. Collins, J. R. Collins and M. T. Krueger, for appellant.

J. F. Gallaher, for appellee.

JORDAN, J.—Action by appellee on two promissory notes, bearing date December 1, 1897, executed by Martin and John Baut, each for \$175, payable to appellee at the First National Bank of Michigan City, Indiana. Upon the issues joined there was a trial by jury, and a verdict returned awarding to appellee the full amount due upon both of the notes, and the jury also returned answers to a series of interrogatories. Appellant John Baut unsuccessfully moved for a new trial and judgment was rendered against him and his codefendant Martin Baut on the verdict of the jury. Appellant John Baut alone appears, Martin Baut having declined to join.

The only error assigned is overruling the motion for a new trial. Appellant filed a separate answer to the complaint, whereby he admitted the execution of the notes, but alleged that he executed each of them as surety for his codefendant Martin Baut, of which fact it is averred appellee had notice at the time the notes were executed. Appellant further alleged in his answer that his said codefendant, on or about September 2, 1897, entered into negotiations with one Fred C. Adams for the purchase of 100 patented dress-making guides, together with the exclusive privilege of selling said guides in Macomb county, in the state of Michigan; that in consideration of said purchase, appellant and Martin Baut executed two promissory notes on September 2,

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1897, payable to said Adams in the sum of \$175 each, at the First National Bank of Michigan City, Indiana. Appellant alleges that after executing these two notes he placed them in the hands of Martin Baut, to be delivered by him to Fred C. Adams, upon the latter complying with the aforesaid agreement, of all of which facts it is averred appellee had notice. The answer then charges that Adams did not comply with the terms of his said agreement, by failing to sell to said Martin Baut the said dressmaking guides, together with the privilege of selling the same in the territory mentioned in the state of Michigan; that Martin Baut on his part also failed to comply with the agreement, by failing to purchase of Adams the guides in question with the aforesaid privilege. It is further averred that after the execution of the notes Martin Baut and Fred C. Adams transferred them to appellee, in consideration of the sale by the latter to Martin Baut of an interest in a certain school wherein the art of dressmaking was taught, of which transaction and sale appellant had no knowledge until after the transfer of the notes to appellee; that when said notes became due appellee procured appellant and Martin Baut to renew them; that when appellant renewed said notes he had no knowledge that they had been diverted from the purpose for which they were intended to be used at the time of their execution, and he renewed them under the belief that they had been used as originally contemplated. It is further alleged that the notes in suit are the ones which under the circumstances appellant renewed, and it is charged that appellee, at and previous to the time that the original ones were transferred to him, knew that they had been executed for the purpose of purchasing from said Adams the guides and territory as heretofore stated, and that they had been executed on the part of appellant for that purpose, and for no other. Upon the facts alleged appellant prayed judgment in his favor. A demurrer to this answer was overruled.

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¶ The errors argued by counsel for appellant relate (1) to the giving and refusing to give certain instructions to the jury; (2) that the evidence does not sustain the verdict of the jury.

As is usually the case, there is a sharp conflict in the evidence upon some of the material or issuable facts in the case. Nevertheless there is evidence going to establish or prove that Martin Baut, who is the son of appellant John Baut, negotiated with one Fred C. Adams for the purchase of 100 patented dressmaking guides, with the right or privilege of selling the same in Macomb county, in the state of Michigan. The purchase price was to be \$350. Two promissory notes of date September 2, 1897, each for \$175, payable to Fred C. Adams at the First National Bank of Michigan City, Indiana, were executed by Martin Baut, as principal, by his father John Baut, appellant herein, as surety. One of these notes was to become due in three months after the date thereof, and the other was to be due in five months. It appears that Martin Baut and Fred C. Adams went to Michigan City and procured appellant to sign said notes for his son Martin. Appellee was not present when the notes were executed. After their execution Martin Baut, with the consent of appellant, took possession of them, and was, as it appears, to turn them over to Adams in payment of his purchase from the latter of the guides and territory in controversy. It seems, however, that Martin Baut and Adams, after the execution of the notes, failed to consummate the sale and purchase in question as intended, for the reason that Martin Baut concluded that instead of making said purchase, as had been agreed upon between himself and Adams prior to the execution of the notes, he would purchase a one-half interest in an institution owned and conducted by appellee in the city of Elkhart, Indiana; said institution being a school wherein the art of dressmaking was taught to the pupils thereof. In respect to the

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question as to whether Martin Baut was solicited by appellee to purchase an interest in the school, the evidence is conflicting; appellee testifying that Martin first came to him and suggested making the purchase of an interest in the school, and that he in no manner solicited or induced him to purchase such interest. There is evidence to establish that Martin Baut offered to turn over to appellee, in consideration of the sale to him of a one-half interest in the school, the two notes, heretofore mentioned, executed by him and his father. Appellee agreed to accept these notes, if Adams, the payee thereof, would indorse them. The latter accordingly indorsed them, and Martin Baut thereafter delivered them to appellee, in consideration of the sale to him of a one-half interest in the school. At the time appellee accepted and received the notes in consideration of said sale to Martin Baut, the jury find, and there is evidence to sustain the finding, that appellee had no knowledge that appellant had signed the notes for the purpose of enabling Martin Baut to purchase the guides and the right to sell them in Macomb county, in the state of Michigan. After the maturity of the note which became due in three months, appellee demanded payment thereof from appellant. The latter claimed that he was not at the time prepared to pay the note, and requested that appellee extend the time of the payment of the two notes for one year. This, appellee, it appears, refused to do, but finally agreed and consented that if appellant and his son Martin Baut would execute new notes to him, he would make one of these new notes payable in four months after December 1, 1897, and the other due and payable in seven months after said date. To this proposition appellant, as it seems, agreed, and the notes in suit were thereupon executed by him and Martin Baut. Adams, the indorser of the old notes, was not a party in any manner to the latter transaction. After the execution of the notes in suit the old ones were surrendered and turned over by appellee to appellant

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and Martin Baut for cancelation. The jury find, and there is evidence to warrant the finding, that at the time appellant executed the new notes he knew that the old ones had not been used by Martin Baut in the purchase from Adams of the dressmaking guides as originally intended. Counsel for appellant apparently confine their argument to the alleged diversion of the original notes, by reason of their being transferred to appellee in consideration of the sale of the one-half interest in the school in controversy, instead of being used by Martin Baut in the purchase of the dress-making guides.

The real question presented under the facts is whether appellee is entitled to recover upon the notes in suit, regardless of any defense which may have existed in favor of appellant against a recovery on the original or old notes in the hands of appellee. The old notes, as shown, were negotiable paper, and were indorsed by Adams before their maturity; and appellee upon the trial claimed that he received and accepted them in the due course of business, giving full value therefor, without notice of any defense thereto, and he insists that under the facts he is shown to have been a *bona fide* purchaser of the old notes. But, passing that question,—as we may, for the reason that upon another view of the case appellant's defense, which he seeks to make, is not sustained by the evidence,—the evidence, as previously stated, discloses that after the maturity of one of the old notes, which was due in three months, appellee called upon appellant for the payment thereof. The latter claimed that he was not then prepared to meet or pay the note, and requested appellee to extend the time of payment of both the notes. It appears that he and appellee finally agreed upon an extension of the time for the payment of the money evidenced by the two old notes, on the condition that appellant and his son should execute new notes. In pursuance of this agreement the notes in suit were executed by appellant and his son, Martin Baut, to

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appellee, one of them being made payable four months after December 1, 1897, and the other was to be due and payable in seven months after that date. Upon the execution of the new notes, appellee surrendered the old ones which he held to appellant and Martin Baut for cancelation. At the time appellant executed the notes in suit, the jury find, and there is evidence to sustain the finding, that he knew that the old notes then held by appellee had not been used for the purpose for which they were intended to be used by Martin Baut at the time they were executed.

Conceding, *arguendo*, that had appellee, before the execution of the new notes, instituted an action to recover upon the old ones, appellant might have defended against a recovery thereon upon the ground of their alleged diversion from the use for which they were originally intended, nevertheless, under the evidence and the facts in this case, he is not now in a position to interpose such a defense against a recovery on the notes in suit. These notes, under the circumstances, are to all intents and purposes new contracts, by which appellant placed himself under new obligations to appellee. By means of the new notes the time for paying one-half of the aggregate principal of the old notes was thereby extended four months, and payment of the other half was extended two months. Appellant, with knowledge of the diversion of the old notes, seems to have requested and obtained an extension of time, of which he availed himself, and agreed under the new obligation to pay to appellee the money at the time or times as therein provided. Upon the execution of the new notes it is shown that appellee surrendered up the old ones to appellant and his son for cancelation. Certainly, then, under the facts and circumstances, appellant, by executing the notes in suit, must be regarded and held as having waived and deprived himself of any right of defense existing in his favor against appellee, growing out of or connected with the old or original notes. *Jaqua v. Montgomery*, 33 Ind. 36, 5 Am. Rep. 168;

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Doherty v. Bell, 55 Ind. 205; *St. John v. Hendrickson*, 81 Ind. 350. It follows, and we so conclude, that the evidence sustains the verdict of the jury.

The instructions given and refused by the court are not in the record. Hence we are not in a position to consider any of the questions which appellant seeks to present in regard to the giving or refusing to give instructions to the jury. In the transcript, after the close of the certificate signed by the trial judge to the bill of exceptions, embracing the original longhand manuscript of the evidence, appears a document, purporting to be a bill of exceptions, containing the instructions given and refused. This bill is signed by the judge, but there is nothing whatever to show that it was ever filed, either in court or with the clerk, after it had been signed. That this is a fatal omission is settled by many decisions of this court. Therefore it follows that the bill in question, purporting to embrace the instructions in question, can not be regarded as a part of the record in this appeal. *Peerless Stone Co. v. Wray*, 143 Ind. 574, and cases cited.

Counsel for appellant seemingly consider that the instructions in dispute are a part of the original bill of exceptions, containing the longhand manuscript of the evidence, which bill has been certified to this court without being transcribed. In their brief counsel say: "The bill of exceptions contains all of the evidence given in the cause, and said bill of exceptions contains all of the instructions given by the court to the jury." If this assertion were true, in respect to the instructions being a part of the bill containing the original longhand manuscript of the evidence, nevertheless, under such circumstances, the instructions would not properly be a part of the record; for it is settled beyond controversy that instructions embodied in an original bill of exceptions, embracing the evidence which is certified upon appeal without copying, can not be legitimately regarded or considered as a part of such bill. *Carlson v. State*,

145 Ind. 650; *Leach v. Mattix*, 149 Ind. 146; *Adams v. State*, 156 Ind. 596-604; *Prudential Ins. Co. v. Sullivan*, 27 Ind. App. 30.

No available error being presented in this appeal, the judgment of the lower court is affirmed.

BOONE v. THE STATE.

[No. 20,055. Filed May 26, 1908.]

CRIMINAL LAW.—*Verdict.*—*Failure to Find Age of Defendant.*—*Indeterminate Sentence Law.*—The absence of a finding in a verdict of conviction of felony as to the age of the defendant as provided by §1908b Burns 1901, will not vitiate the verdict, and the court had the right to assume in assessing the punishment that the defendant was not of an age to entitle him to be confined in the reformatory instead of the state prison.

From Madison Circuit Court; *M. A. Chipman*, Special Judge.

Charles Boone was convicted of assault and battery with intent to rob, and he appeals. *Affirmed.*

Austin Retherford, *W. A. Kittinger* and *W. S. Diven*, for appellant.

C. W. Miller, Attorney-General, *C. C. Hadley*, *L. G. Rothschild* and *W. C. Geake*, for State.

HADLEY, J.—Appellant was charged in three counts—for assault and battery with intent to murder, with assault and battery with intent to commit robbery, and for robbery. Trial by jury, and the following verdict returned: “We, the jury, find the defendant guilty of assault and battery with intent to rob, as charged in the second count of the affidavit and information. E. Steffy, foreman.”

Appellant unsuccessfully moved for a *venire de novo* on the ground of uncertainty and insufficiency of the verdict, and for a new trial. The judgment was that appellant be confined in the Indiana state prison not less than two nor more than fourteen years, and pay a fine of \$1.

160	678
162	690
160	678
165	528

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The only question presented is the sufficiency of the verdict to sustain the judgment for failure to find appellant's age. Appellant claims that because the verdict does not disclose his age, the court had no foundation upon which to assess his punishment, and that according to him the presumption of the lesser age, to which the law entitled him, and which carried with it a milder punishment in the reformatory, the judgment was erroneous, because it withheld from him the favorable presumption and indulged against him the most unfavorable by assessing against him the severest grade of punishment, namely, confinement in the state prison for the indeterminate period.

We can not accept appellant's construction of the statute as the true one. In cases of felony it is the duty of the court or jury trying the case to find whether the defendant is over sixteen or less than thirty years of age. §1906b Burns 1901. But the statute does not require the State to make the proof. It is proper for either side to make it, but not required of either side, or essential to the trial that it be made at all. The finding does not affect the guilt or innocence of the defendant, nor the extent of his punishment, nor is it responsive to any necessary averment of the indictment. The sole object is to inform the court whether the defendant is entitled to serve his punishment in the reformatory or state prison. In so far as the former of these prisons may be preferred to the latter, it is a benefit belonging to the defendant, easily available to him if he chooses to make it so. If he is indifferent, and permits the trial to close when the State has neglected or been unable to make the proof, without signifying his acceptance of the benefit by making the proof himself, he will not be heard to complain after judgment that the court has sentenced him to the wrong prison. *Colip v. State*, 153 Ind. 584, 74 Am. St. 322. We see no reason, however, why such proof may not be made even after verdict if the court, in its discretion, deems proper to allow it.

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The absence of a finding in the verdict as to the age of appellant did not vitiate the verdict, and the court had the right to assume thereupon that the defendant was not of an age to entitle him to be confined in the reformatory, and properly rendered judgment of confinement in the State's prison.

We find no error. Judgment affirmed.

CHICAGO AND SOUTHEASTERN RAILWAY COMPANY
v. WITT.

[No. 20,084. Filed May 26, 1903.]

RAILROADS.—Enforcement of Judgment.—Summoning Agent to Answer as to Funds in His Hands.—A suit for the enforcement of a judgment against a railroad company under §834a Burns 1901 is in the nature of a proceeding in garnishment, and where no writ was issued against the agent, and he had not answered as to funds in his hands, or as to the amount that would probably come into his hands, there was no *res* on which to base a judgment ordering such agent to pay into court a certain amount monthly, until the judgment should be paid, out of the funds coming into his hands as such agent.

From Tipton Circuit Court; *W. W. Mount*, Judge.

Action by Solomon Witt against the Chicago & South-eastern Railway Company. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Reversed.*

W. R. Crawford, U. C. Stover, W. H. Najdowski, John Oglebay and *W. R. Oglebay*, for appellant.

L. S. Baldwin, for appellee.

GILLET, J.—This action was commenced by appellee in Hamilton county on the 6th day of June, 1899. His complaint charges that appellant is a railroad corporation organized under the laws of the State of Indiana; that it owns and operates a railroad through said county of Hamilton; that on the 2d day of June, 1898, appellee duly

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recovered a judgment against appellant in the circuit court of said county in the sum of \$943.35, with costs, which judgment is in full force, unappealed from, and wholly unpaid, and that thereafter an execution was duly issued on said judgment, directed to the sheriff of said county, who made a return thereon of no property found. Prayer that a writ issue, directed to the sheriff of said county, for the agents, conductors, and employes of appellant, commanding each to appear and answer as to the amount of money in his hands belonging to it, and also as to the probable amount that would come into his hands as such agent, and for all other proper relief. Process was duly served upon appellant, and, after unsuccessfully demurring, it filed answer in general denial to the complaint. The venue was changed to the court below, where the cause was submitted, and, pursuant to request, the court afterwards filed its special findings of facts, together with its conclusions of law. Judgment was rendered that appellee recover of appellant the sum of \$1,102.25, together with his costs, and that one G. N. Horton, as agent of appellant, pay into the office of the clerk of the Tipton Circuit Court the sum of \$50 per month, out of the funds coming into his hands as such agent, until said judgment should be fully paid.

It is evident that the court below erred in its conclusions of law. The complaint is founded on the act of April 27, 1899 (Acts 1899, p. 120, §834a Burns 1901). The proceeding is to a considerable extent analogous to a proceeding in garnishment. It is *quasi in rem*. Brown, Jurisdiction (2d ed.), §71; 14 Am. & Eng. Ency. Law (2d ed.), 742. The statute does not, however, contemplate that a judgment shall be taken against the debtor beyond the enforcement of the writ; and in a case of this kind, where no writ has issued against the agent, and where he has not answered concerning funds in his hands, or as to the amount that will probably come into his hands, it is clear that there has been no sequestration, and that, therefore, there was no *res* on

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which to base an effective order in aid of the judgment plaintiff. See Shinn, Attachment, §610; Drake, Attachment (7th ed.), §§89a, 452a; Waples, Attachment (2d ed.), §645.

It is true that the debtor appeared to the action, but, as long as there was no subject-matter before the court on which it could base a judgment—the debtor not being personally liable—any attempted adjudication that the court might make was necessarily void. The further questions in this case need not be decided.

Judgment reversed, and trial set aside, with an order to dismiss the proceedings unless appellee files an intervening motion that a writ issue requiring some agent of appellant to answer as provided by statute.

STATE BANK OF INDIANA v. BACKUS ET AL.

[No. 20,106. Filed May 26, 1903.]

APPEAL AND ERROR.—*Special Finding.*—*Silence of Finding.*—The silence of the special finding will be considered on appeal as equivalent to an express finding against the appellant on all material facts which it was obliged to prove. pp. 692, 693.

MORTGAGES.—*Failure to Record.*—*Good as Against General Creditors.*—*Fraud.*—In the absence of express fraud, the failure of a mortgagee to record a mortgage within the time fixed by the statute will not, as against the general creditors of the mortgagor, either prior or subsequent, render it invalid. pp. 693-695.

FRAUDULENT CONVEYANCE.—*Failure to Record Deed.*—The mere fact that a deed executed by a husband to his wife to secure a debt to the wife was withheld from record by the latter to preserve the husband's credit, she knowing that her husband was engaged in a hazardous financial business, will not render the deed invalid as against subsequent unsecured creditors who extended credit to the husband on the faith of his supposed ownership of the property, no dishonesty or fraud on the part of the wife being shown to exist. pp. 694, 695.

SAME.—*Failure to Record Deed.*—*Mortgages.*—The fact that a deed executed by a husband to his wife to secure a debt due the wife was purposely kept off the record, with a fraudulent intent, would not vitiate a subsequent mortgage executed by the hus-

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band to his wife in good faith, and upon a valuable consideration, although the new mortgage was intended to secure the debt described in the instrument which was never recorded. pp. 696-697.

MORTGAGES.—Foreclosure.—Decree.—In a suit to foreclose a mortgage in which defendant's wife was joined as an encumbrancer, a provision in the decree that in case the property was purchased by the wife she should have the right to credit her mortgage indebtedness on the purchase price after paying in a sum sufficient to discharge in full the prior liens was not improper. pp. 697-699.

SAME.—Foreclosure.—Decree.—Inchoate Interest of Wife.—A foreclosure decree directing the sale of the undivided two-thirds of the realty in the first instance and reserving the remainder for defendant's wife as and for her inchoate interest in the real estate was proper. pp. 697-699.

From Superior Court of Marion County; *Vinson Carter*, Judge.

Suit by State Bank of Indiana against Victor M. Backus and others. From a judgment in defendants' favor, plaintiff appeals. Appealed from Appellate Court, under clause 3, §1337j Burns 1901. *Affirmed*.

J. W. Claypool and *D. W. Howe*, for appellants.

J. R. Wilson, *M. M. Townley*, *Pierre Gray* and *F. C. Cutter*, for appellees.

DOWLING, J.—The suit was brought by the appellant to foreclose a mortgage upon real estate in the city of Indianapolis; also to set aside as fraudulent a certain deed and mortgage upon the same property executed by the appellee Backus to his wife, and to subject the premises to four judgments in favor of the bank and against Backus. The appellees, Backus and wife, each filed an answer in denial. The Rand Drill Company, another appellee, filed an answer setting up a judgment against Backus held by it. By a supplemental complaint, the bank demanded the recovery of certain taxes paid by it after the commencement of the suit, making the appellee Robinson a defendant, and requiring him to answer as to his interest. Robinson filed a disclaimer, and the other defendants separately answered, denying the matters stated in the supplemental complaint.

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At the request of the parties, the court made a special finding of facts, with its conclusions of law thereon. The appellant excepted to the third and fourth conclusions, and the court rendered judgment upon the finding. Motions by the appellant to modify the judgment were made and overruled. These decisions are assigned for error.

The material facts found by the court were: That Backus owned certain real estate in the city of Indianapolis; that on February 4, 1894, he borrowed \$4,000 from one McCarty, for which he executed his two notes for \$2,000 each, with interest coupons attached, and secured the same by a mortgage on the real estate described in the complaint; that the mortgage was duly recorded; that the time for the payment of said notes was afterwards extended by agreement until February 2, 1898, and that on April 24, 1897, McCarty sold and assigned the two notes, with the unpaid interest coupons, to the bank; that afterwards, as the result of certain dealings between Backus and his wife, which need not be set out in detail, in which she advanced and loaned moneys to him, or for his use, Backus became justly indebted to his wife to the amount of \$8,656.39, which indebtedness Backus agreed, in writing, with his wife, to secure or pay; that in February, 1895, Mrs. Backus went to San Antonio, Texas, where her husband was engaged in business with other persons in the construction of a public sewer, and procured from Backus a warranty deed to the said premises, which recited a consideration of \$24,000, but the actual consideration of which was money advanced and to be advanced by her for the construction of a house on said premises, a claim for money loaned by her to her husband in the years 1882, 1883, and 1886, and certain notes of her husband, to the amount of \$10,000, executed by him to the Shaw Carriage Company, purchased by Mrs. Backus from the receiver of that company, and for which she paid not less than \$100, nor more than \$300; that the said deed was never recorded, but is still

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held by Mrs. Backus; that said deed, although absolute in form, was in fact intended to secure said indebtedness; that about April 3, 1896, Mrs. Backus was advised by counsel that the said instrument was, in legal effect, a mortgage; that it was misleading on account of its form, and that she ought to obtain from her husband a mortgage securing the amount claimed to be owing to her by her husband; that on April 3, 1896, Backus executed to his wife a note for \$10,750, and secured the payment of the same by a mortgage upon the real estate in controversy in this suit, which mortgage was on April 17, 1896, duly recorded in the office of the recorder of Marion county, Indiana; that the consideration of the said note was \$8,250 in money loaned or advanced by Mrs. Backus to her husband, and before that used for the purpose of building a house on said premises, and the sum of \$2,500 in money claimed to have been loaned by her to him in 1882, 1883, and 1886. That in January, 1895, Backus entered into a partnership with James W. Wilding, Luther A. Marshall, and William R. Hines, the purpose of which firm being the construction of a public sewer in the city of San Antonio, Texas; that on April 30, 1895, said firm borrowed from the appellant \$10,000; on the same day said appellant bought two notes each for \$2,500, executed by said firm; on the same day said firm borrowed from the appellant the further sum of \$5,000; and on June 4, 1895, a further loan of \$5,000 was made by the appellant to said firm; that all these notes, except the two purchased by the appellant, were indorsed by each member of the said firm, and were renewed from time to time; that none of said notes was paid; that said firm, after prosecuting the work on said sewer at San Antonio for a short time, became insolvent; that suits were brought by the appellant on the said several notes in the superior court of Marion county, Indiana, and that judgments were recovered by the appellant against Backus, Hines, and Wilding as follows: July 1, 1896, a judgment for \$6,545.91; July 1, 1896, a judg-

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ment for \$5,424.78; September 19, 1896, a judgment for \$10,759.94; August 21, 1896, a judgment for \$2,781.76—all of which judgments are due and unpaid; that on April 20, 1895, when the appellant made its first loan of \$10,000 to the said firm, it inquired of the said Victor M. Backus as to the real estate then owned by him, and that he represented to the appellant that he owned the real estate in controversy in this suit, and that he owed nothing upon it except the said McCarty mortgage debt of \$4,000 and interest; that after making said loan of \$10,000, said appellant caused an examination of the records in the office of the recorder and treasurer of Marion county to be made, and ascertained that said real estate was in the name of the said Victor M. Backus, and did make said loan of \$10,000, and all of the subsequent loans and renewals heretofore mentioned, relying on the truth of the representations of said Victor M. Backus, and believing that he was the owner of said real estate described in the complaint herein, and that there were no liens or encumbrances of any kind against the same, other than the said McCarty mortgage. That in the years 1892 and 1893 the appellee Victor M. Backus held the office of treasurer of Marion county, Indiana, from which office he realized profits during said term amounting to \$40,000; that at the time of the execution of the deed for the property in controversy by Victor M. Backus to his wife, Mary J. Backus, on May 23, 1895, the said Victor M. Backus was the owner of real estate, including the property in controversy, of the value of \$40,000; that he also had personal property of the value of \$4,000; that said real estate was encumbered at the time to the amount of \$10,000; that the other indebtedness of the said Victor M. Backus, including the indebtedness to his wife, amounted to \$12,000; that the total value of the property owned by Victor M. Backus at said date was \$44,000; that the total amount of his indebtedness at said date was \$22,000; that

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at said date the defendant Marshall was insolvent; that the said defendants, Wilding and Hines, were both solvent, and were worth, between them, at least the sum of \$20,000; that at said time the indebtedness of said firm was \$45,000; that the assets of said firm at said time were at least \$15,000; that at the time of the execution and delivery of said deed of May 23, 1895, by Backus to his wife, she knew that the business in which his firm was engaged was in some degree a hazardous one, in which large profits might be made and large losses sustained; that she also knew that said firm was then indebted to the appellant, for money loaned by it to said firm, in a sum between \$10,000 and \$15,000, and that she also knew that the recording of said deed would impair the credit of her husband, and for that reason she withheld it from record, that at said time appellant had no knowledge or notice of the agreement in writing between Backus and his wife, by which he agreed to secure or satisfy her claim against him, nor of the alleged indebtedness of the said Backus to his wife, and that it did not obtain knowledge of such indebtedness until after the recording of the mortgage executed by Backus to his wife April 3, 1896, which recording took place April 17, 1896; that between the 23d day of May, 1895, and the 3d day of April, 1896, the appellee Victor M. Backus sold and conveyed a large proportion of his real estate, and on said 3d day of April, 1896, he was the owner of real estate, including the property in controversy in this action, of the value of \$28,075; that his individual indebtedness, including the debt to his wife, amounted to \$16,956; leaving a surplus of assets over individual indebtedness at that date of \$11,119, but that by reason of his liabilities as a member of said firm of Wilding, Marshall, Backus & Hines, he was then insolvent; that on May 23, 1895, the true amount of indebtedness from Backus to his wife was as follows, to wit:

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For money paid on construction of the house on the property in controversy, including the sums which she had promised to furnish and did furnish within the next sixty days thereafter	\$8,156.39
Money previously loaned to the said Victor M. Backus	2,500.00
Total	\$10,656.39
From which sum should be deducted the money paid by Victor M. Backus upon the purchase price of the property of Mary J. Backus, at her request.....	\$2,000.00
Leaving a balance in favor of Mary J. Backus of	\$8,656.39

Which sum is due and unpaid, with interest thereon from April 3, 1896; that to the extent of \$2,093.61 the note executed by Backus to his wife April 3, 1896, and secured by mortgage on the property in controversy, was without consideration; that on May 23, 1895, the lot in controversy in this suit, without the building thereon, was of the value of \$9,000, and the five-foot strip adjacent thereto, and included in said premises, owned by Mary J. Backus, was at said time of the value of \$750; that said lot was at the date of said finding, exclusive of the buildings, of the value of \$12,000; that the five-foot strip adjoining the same, owned by the appellee Mary J. Backus was of the value of \$1,000, and that the buildings on said lot, including said strip of five feet, were of the value of \$12,000.

The conclusions of law upon the foregoing facts were stated as follows: "(1) That the deed executed by the defendant Victor M. Backus to his wife, Mary J. Backus, on the 23d day of May, 1895, is a mortgage to secure the indebtedness of Victor M. Backus to his wife, Mary J. Backus, and plaintiff is entitled to have it so declared. (2)

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That plaintiff is entitled to have judgment against the defendant Victor M. Backus on the notes sued on in the complaint, including attorney's fees, for the sum of \$6,029.46, and also to a decree foreclosing said mortgage and an order to sell the mortgaged premises to pay said mortgage debt. (3) That the defendant Mary J. Backus is entitled to a lien on the real estate in controversy, by virtue of the mortgage executed to her on April 3, 1896, for the sum of \$8,656.39, with interest thereon from April 3, 1896, at eight per cent., and also to an order, after first paying the amount due to plaintiff under its mortgage, and any tax liens on said mortgaged premises, and costs of this suit, applying the residue to the payment of the said mortgage indebtedness in her favor. (4) That, if there is any residue remaining, the proceeds of the sale of said mortgaged premises after paying the sums in the foregoing conclusions of law, and deducting any sum due the defendant Mary J. Backus on account of her inchoate interest, then plaintiff is entitled to have such residue applied to the payment of the judgments in its favor, as found in number seven of the special finding, in the order of the dates of their rendition."

Counsel for appellant contend that the third and fourth conclusions are erroneous: (1) Because the mortgage of Mrs. Backus was fraudulent; and (2) because she was estopped to set it up to defeat appellant's judgments, whether it was fraudulent or not.

There is no question as to the priority of the mortgage executed to secure the notes given by Backus to McCarty which were assigned to the appellant, but the point in controversy is the validity and precedence of the lien of the deed executed by Backus to his wife as security for her claim against him over the judgments held by the appellant. According to the finding of the court, the debts due to Mrs. Backus from her husband, both at the time of the execution of the deed of May 23, 1895, and of the mortgage of April 3, 1896, to the amount of \$8,656.39, with interest

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thereon from April 3, 1896, were just and honest, and both instruments were executed in good faith, upon a valuable consideration, and with no intention to cheat, hinder, delay, or defraud anyone. It was also found that at the time of the execution of the deed of May 23, 1895, Backus was solvent. It further appears that the mortgage of April 3, 1896, was executed by Backus as a substitute for the so-called deed of May 23, 1895, which Mrs. Backus had been advised amounted to a mortgage only and was objectionable as misleading on account of its form. There was no agreement or understanding between Backus and his wife that she should keep the deed off the record. Mrs. Backus had no knowledge at any time that her husband was insolvent, or that he intended to obtain or was obtaining credit from the appellant on the faith of her ownership of the real estate described in the complaint, or because said real estate was believed to be unencumbered except by the McCarty mortgage. She did not have her deed which she held as security for the payment of the debts due to her placed upon record, and her reason for so withholding it was her knowledge that the recording of the deed would impair the credit of her husband. She also knew at the time the deed was executed to her that the business in which her husband's firm was engaged was in some degree hazardous, in which large profits might be made and large losses sustained, and she also knew at that time that the said firm was indebted to the appellant for money loaned in a sum between \$10,000 and \$15,000. In these circumstances, did the fact that the deed of May 23, 1895, was not placed upon record deprive Mrs. Backus of her security under it and under her mortgage of April 3, 1896, as against a general creditor who extended credit to her husband, and to a firm of which he was a member, in the belief that he was the owner of the property in controversy, and that it was unencumbered except by the McCarty mortgage?

The issue in the case is clearly presented by the allega-

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tions of the complaint touching the supposed fraud committed by the appellee Mary J. Backus jointly with her husband, which were as follows: "That in anticipation of the anticipated insolvency of said firm, and of all the individual members thereof, and for the purpose of cheating, hindering, and delaying the creditors of the said defendant, Victor M. Backus, and particularly the plaintiff, he and his codefendant Mary J. Backus did conspire together to cover up and conceal the property of the said defendant Victor M. Backus, and to prevent his creditors from reaching the same for the satisfaction of their just claims, and pursuant to said conspiracy said Victor M. Backus did, on or about May 23, 1895, without any consideration therefor, execute to said defendant Mary J. Backus a deed conveying to her the real estate so as aforesaid mortgaged to said Nicholas McCarty, the same being then of the value of about \$25,000, but in order to conceal the fact of the execution of said deed, and to hold out the defendant Victor M. Backus to the public and to this plaintiff as still the sole and absolute owner thereof, and thereby to enable him to obtain credit and to borrow money upon the faith of his apparent ownership of said real estate, said defendant Mary J. Backus fraudulently withheld said deed from record, and failed to give any notice whatever to plaintiff or to the public of the making of said deed, or in any way to give notice to the plaintiff or to the public that she held or claimed to hold any title, lien, or interest of any kind whatsoever in or against said real estate. That afterwards, pursuant to the conspiracy between them, as aforesaid, to cheat, hinder, and delay the creditors, and especially the plaintiff, in the collection of their just claims against the said defendant, Victor M. Backus, he did on April 3, 1896, execute a mortgage of said real estate to the said defendant Mary J. Backus, purporting to be made to secure a pretended indebtedness, which plaintiff alleges was wholly false and fictitious, from him to her, of \$10,200, which she, the said Mary J. Backus,

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also fraudulently withheld from record until April 17, 1896, and after plaintiff had begun an action against her and said Victor M. Backus on some of the notes aforesaid before that time executed by the members of said firm of Wilding, Marshall, Backus & Hines. That there was no consideration for the execution of either said deed or mortgage, and both were executed pursuant to said conspiracy by and between said defendants to cheat, hinder, and delay the creditors of said Victor M. Backus."

The material facts charged, and which constitute the very basis of the supposed right of the appellant to set aside the deed of May 23, 1895, and the mortgage of April 3, 1896, are a conspiracy between Backus and his wife to cheat, hinder, and delay the creditors of Backus; the anticipation by both Backus and his wife of the insolvency of his firm in San Antonio, Texas, and of the individual members thereof; the execution of the deed of May 23, 1895, without consideration; the withholding of the deed from record as a part of the fraudulent scheme to enable Backus to obtain credit, and to cheat, hinder, and delay his creditors; the wholly false and fictitious character of the indebtedness secured by the deed; and the total want of consideration of the mortgage of April 3, 1896.

It might be sufficient to say that none of these allegations was supported by the special finding, and that many of the most important were expressly negatived. No conspiracy was found to exist. At the time of the execution of the deed of May 23, 1895, Backus was solvent. Neither Backus nor his wife anticipated his insolvency or that of his firm. The deed of May 23, 1895, was executed upon a full and valuable consideration, consisting of a just indebtedness of Backus to his wife, amounting to \$8,656.39. The deed was not withheld from the record as a part of any fraudulent scheme or understanding between Backus and his wife, but only because she knew that such recording would impair his credit. The indebtedness intended to be secured by the deed

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of May 23, 1895, was not false and fictitious, but was true and *bona fide*. The mortgage of April 3, 1896, was made in good faith to secure debts justly owing. Mrs. Backus made no representations concerning the ownership of the property in controversy or the liens thereon, and those made by her husband were made without her knowledge and without authority from her. The mortgage of April 3, 1896, was executed and recorded before the appellant obtained any judgment against Backus. Under repeated decisions of this court, the silence of the special finding must be taken as equivalent to an express finding against the appellant on all material facts which it was obliged to prove. *Archibald v. Long*, 144 Ind. 451, 454; *Citizens State Bank v. Julian*, 153 Ind. 655, 676; *Durflinger v. Baker*, 149 Ind. 375; *Graham v. State, ex rel.*, 66 Ind. 386; *Travellers Ins. Co. v. Patten*, 98 Ind. 209, 215; *Spraker v. Armstrong*, 79 Ind. 577.

This leaves little in the case except the fact that Mrs. Backus voluntarily withheld her deed of May 23, 1895, from the record because she knew that such recording would impair her husband's credit, and that the appellant, relying upon Backus' supposed ownership of the real estate, loaned to him and to his firm the moneys mentioned in the complaint.

It is said that a mortgagee's right depends very essentially upon the registry of his mortgage, and upon the priority of that registry. The policy of this country has been in favor of the certainty and security, as well as convenience, of a registry, both as to deeds and mortgages; and, by the statute law of nearly every state of the Union, every conveyance of real estate, whether absolutely or by way of mortgage, must be recorded in the proper office of the county in which the real estate is situated, after being duly proved or acknowledged and certified as the law prescribes. If not recorded, it is void as against any subsequent purchaser or mortgagee in good faith, and for a valuable consideration

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of the same estate, or any portion thereof, whose conveyance shall be first duly recorded. 4 Kent's Comm., 168. Such is the statute of this State, which provides that every conveyance or mortgage of lands, or of any interest therein, shall be recorded in the recorder's office of the county where such lands shall be situated, and that every conveyance not so recorded in forty-five days from the execution thereof shall be fraudulent and void as against any subsequent purchaser, lessee, or mortgagee in good faith and for a valuable consideration. §3350 Burns 1901; *Sparks v. State Bank*, 7 Blackf. 469, 472.

It will be seen, however, that the only persons against whom unrecorded deeds and mortgages are by the statute declared to be fraudulent and void are subsequent purchasers, lessees, or mortgagees. General creditors are not within the purview of the act, and they can found no right upon its provisions. When they seek to set aside an unrecorded deed or mortgage as fraudulent, they must establish the fraudulent intent in the execution of the instrument as a fact. The fraud which renders the instrument void as to general creditors is not the failure to record it, but the dishonest or illegal intent with which it was executed and received. It is settled in this State that, in the absence of express fraud, the failure of a mortgagee to record a mortgage within the time fixed by the statute will not, as against the general creditors of the mortgagor, either prior or subsequent, render it invalid. This question received careful and exhaustive examination in *Hutchinson v. First Nat. Bank*, 133 Ind. 271, 36 Am. St. 537, and the conclusions arrived at in that case are decisive of the present controversy. The withholding of a mortgage from record is a fact which may be shown in connection with other facts tending to establish fraud in the execution of the instrument; but where, as in the case before us, the court finds either that all of the acts of the parties were done honestly and in good faith, or fails to find that they were dishonest

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or fraudulent, the deed or mortgage can not be adjudged fraudulent and void solely on the ground that it was not recorded, and that, in ignorance of the existence of the instruments assailed, credit was given to the mortgagor upon the faith of his supposed ownership of the property. *Wilson v. Campbell*, 119 Ind. 286; *Stix v. Sadler*, 109 Ind. 254; *Citizens Bank v. Bolen*, 121 Ind. 301; *Farmers Loan, etc., Co. v. Canada, etc., R. Co.*, 127 Ind. 250, 11 L. R. A. 740; *Morgan v. Worden*, 145 Ind. 600; *Adams v. Curtis*, 137 Ind. 175, 179; *Brigham v. Hubbard*, 115 Ind. 474; *Heiney v. Lontz*, 147 Ind. 417; *Marmon v. White*, 151 Ind. 445; *American Trust, etc., Bank v. McGettigan*, 152 Ind. 582, 588, 71 Am. St. 345.

The giving of credit by the appellant to Backus, and its inability to collect its claims, can not be justly attributed to the failure of Mrs. Backus to have her deed placed upon record, nor can they fairly be regarded as the natural and probable consequences of that omission. In giving credit to Backus the appellant may have been influenced by many other considerations, such as his previous standing and character in the business community, his general reputation as a man of property, and his promptness and integrity in former dealings with the bank. The court did not find that if the appellant had known that the deed had been executed, it would not have made the loans to Backus or to his firm.

If it be true, as asserted by counsel for appellant, that the taking of a deed, instead of a mortgage, as security for a debt, is an indication of fraud requiring explanation, we can not say that the transaction was not fully explained by the evidence; and as the court failed to find the existence of fraud, we must presume that such explanation, if necessary, was made.

Without affirming or denying the proposition that a deed not fraudulent when executed may become so by concealment, it is perfectly clear that this result will not follow

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from the mere withholding of the deed from record, where the party attacking it is neither a subsequent purchaser, lessee, or mortgagee. To hold that such failure to record would have that effect would be to extend the statute far beyond its letter and purpose, and to place general creditors of the grantor or mortgagor upon the footing of subsequent purchasers, lessees, and mortgagees.

There was no finding that Mrs. Backus allowed her husband to use and invest her moneys in property in his own name, and to get credit upon it, and that she postponed taking security for her claims against him until he became insolvent, or was in danger of insolvency. On the contrary, the court found that she took the deed by way of security at an early stage of the dealings between herself and her husband, and while he was solvent.

The court did not find the existence of fraud as an ultimate fact in the conduct of the appellees, nor is fraud in their proceedings deducible from the other facts specifically found. All of these are consistent with the conclusion that the deed and mortgage executed by Backus to his wife were given in good faith, and we can discover nothing in the conduct of the appellee Mary J. Backus which should operate to estop her from setting up and enforcing her security in the present suit.

But suppose that Mrs. Backus had purposely and with a fraudulent intent withheld from record the instrument executed by her husband May 23, 1895. This would not have prevented her from abandoning it altogether, and taking from her husband a new mortgage to secure the payment of any indebtedness justly due to her from him. The appellant could not have been harmed by the mere existence of an instrument under which no right was asserted. Neither would the fact that it was purposely kept off the record with a fraudulent intent vitiate a subsequent mortgage executed by the husband in good faith and upon a valuable consideration, although the new mortgage was intended to secure the

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debt described in the instrument which was never recorded. Backus executed the new mortgage April 3, 1896, and it was placed upon record April 17, 1896, within the time required by the statute. The first of appellant's judgments was rendered July 1, 1896, or seventy-four days after the new mortgage was recorded. This mortgage could be set aside by the appellant only upon proof that it was executed without consideration or with a fraudulent intent of which Mrs. Backus had notice, or concerning which she should have made inquiry. As the appellant took no mortgage or other lien upon Backus' real estate, it left him free to mortgage or otherwise encumber or convey the same to any purchaser or mortgagee in good faith for a valuable consideration. The court found that the mortgage of April 3, 1896, was executed by Backus to his wife in good faith, and to secure a valid and just claim against him. She had the right to obtain security for the payment of her claim, just as any other *bona fide* creditor might have done. She did obtain her mortgage before any lien upon the premises mortgaged was acquired by the appellant, and no rule of law or equity deprives her of the advantage so obtained. *Heiney v. Lontz*, 147 Ind. 417; *Adams v. Curtis*, 137 Ind. 175; *Fulp v. Beaver*, 136 Ind. 319; *Dillen v. Johnson*, 132 Ind. 75; *Rockland Co. v. Summerville*, 139 Ind. 695; *John Shillito Co. v. McConnell*, 130 Ind. 41.

The court rendered judgment upon the finding and conclusions of law in favor of the appellant for \$6,029.40, the amount due upon the notes assigned by McCarty to the appellant, and for the appellee Mary J. Backus for \$12,309.39. The decree further provided for the foreclosure of the mortgages of the appellant and the appellee Mary J. Backus and, in the first instance, for the sale of the undivided two-thirds of the mortgaged premises, and that the remaining one-third of the real estate be reserved and set apart to the appellee Mary J. Backus, as and for her inchoate interest in said property. It also directed that if the

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proceeds of the sale of such two-thirds of the real estate should be more than sufficient to pay the mortgage indebtedness, then such proceeds should be applied (1) to the payment of the costs of the suit; (2) to the discharge of the tax claim held by the appellant, to the amount of \$1,630.76, with interest; (3) to the payment of the appellant's judgment for \$6,029.40, the amount of the mortgage debt, with interest thereon; (4) to the payment to the appellee Mary J. Backus of \$12,309.39, the amount of her mortgage claim, with interest on the same; and (5) to the payment of the judgments due and found to be owing to the appellant as set out in the special finding. The judgment also provided that in case the property should be sold, and the same should be bid in by Mrs. Backus, she should have the right to credit her mortgage indebtedness on the purchase price, after paying in a sum sufficient to discharge in full the claim of the appellant.

The appellant moved to strike out that part of the judgment directing that two-thirds only of the real estate be sold in the first instance, and that the remaining third be reserved and set apart to Mary J. Backus as and for her inchoate interest in the premises. It also moved to strike out so much of the judgment as authorized a credit upon the bid of Mrs. Backus of the amount of her mortgage indebtedness in case she should purchase the property at a sale under the decree after paying in cash the full amount of the claim of the appellant. A further motion was filed by the appellant to modify the decree by striking out everything between the first and last clauses thereof, and inserting in lieu thereof, in substance, that the deed executed by Backus to his wife May 23, 1895, was, in effect, a mortgage to secure the same debt described in the mortgage of April 3, 1896; that the McCarty mortgage, held by the appellant, be foreclosed, and that the whole of the premises in controversy be sold without relief from valuation laws, as other lands are sold on execution; that the proceeds be applied (1) to

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the costs of the suit; (2) to the appellant's tax claim of \$1,630.76, with interest; (3) to appellant's mortgage claim of \$6,029.40, with interest; (4) to the mortgage claim of Mary J. Backus, amounting to \$12,309.39, with interest; and (5) to the payment of the judgments held by the appellant, as found by the court, with interest thereon.

While that portion of the decree directing the sale of the mortgaged premises was not, in all respects, such as might have been proper under the statute, the modifications demanded by the appellant were unauthorized and inappropriate, and the court did not err in refusing to make them. The proposed recital concerning the deed of May 23, 1895, was altogether unnecessary; its character and purpose having been fixed and declared by the finding and the decree as it stood. The direction concerning the credit to be allowed upon the bid of Mrs. Backus in the event that she became the purchaser of the real estate at the sale under the decree was not improper, although it may have been superfluous. The proposed order for the sale of the whole of the premises, without provision for the protection of the inchoate interest of Mrs. Backus therein, was palpably wrong. Upon such a sale, unless she redeemed the property within a year, her interest would have been entirely lost.

We find no error in the record. Judgment affirmed.

LANE v. PATTON ET AL.

[No. 19,889. Filed January 30, 1903.]

From Montgomery Circuit Court; *Jere West*, Judge.

Suit by Edward Patton against Joanna M. Lane and others. From a decree for plaintiff, Joanna M. Lane appeals. *Reversed*.

H. H. Ristine, T. H. Ristine and Harold Taylor, for appellant.

Charles Johnston, W. H. Johnston, M. W. Bruner, Louis McMains, Benjamin Crane and A. B. Anderson, for appellees.

DOWLING, J.—This action, like that of *Taylor v. Patton*, *ante*, 4, was brought by the appellee Patton to enforce an assessment

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against the property of the appellant for a street improvement under an ordinance passed by the common council of the city of Crawfordsville. The questions presented are the same as those in *Taylor v. Patton*, *supra*, and, on the authority of that case, the judgment is reversed, with instructions to sustain the demurrers to the complaint, and for further proceedings in conformity to this opinion.

PETERSON v. UNION TRUST COMPANY ET AL.

[No. 20,000. Filed January 15, 1903. Motion to reinstate overruled March 11, 1903.]

From Adams Circuit Court; *D. D. Heller*, Judge.

Suit by the Union Trust Company against Eliza J. Peterson and others. From a decree for plaintiff, Eliza J. Peterson appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Appeal dismissed.*

R. S. Peterson, Shaffer Peterson and C. O. France, for appellant
O. B. Jameson and F. A. Joss, for appellees.

HADLEY, C. J.—This appeal was filed here August 21, 1901, and is governed by the rules of this and the Appellate Court promulgated January 4, 1900, and in force since November 26, 1900. There is no index attached to the transcript as required by the third of said rules, and under the authority of *State, ex rel., v. Lankford*, 158 Ind. 84, the appeal is dismissed.

HELMS ET AL. v. SHERMAN ET AL.

[No. 19,882. Filed May 1, 1903.]

From Hamilton Circuit Court; *J. F. Neal*, Judge.

Petition by Thomas Sherman and others for a drain. From a judgment for petitioners, remonstrators appeal. *Affirmed.*

I. W. Christian, W. S. Christian and E. C. Cloe, for appellants
George Shirts and W. R. Fertig, for appellees.

GILLETT, J.—The same question is presented in this case as was involved in *Makeever v. Martindale*, 158 Ind. 655, and upon the authority of that case this case is affirmed.

Huntington County Loan, etc., Assn. v. Cast.

HUNTINGTON COUNTY LOAN AND SAVINGS ASSOCIATION v. CAST ET AL.

[No. 19,990. Filed June 17, 1903.]

From Huntington Circuit Court; C. D. Landis, Special Judge.

Action by the Huntington County Loan & Savings Association against Simon T. Cast and others. From a judgment for defendants, plaintiff appeals. *Affirmed.*

U. S. Lesh and M. L. Spencer, for appellant.

O. W. Whitlock, S. E. Cook, T. G. Smith, J. B. Kenner and Eben Lesh, for appellees.

DOWLING, J.—Action by the appellant upon the bond of the appellee Cast, who had been the secretary of the association, to recover moneys received by him as such officer, and for which he had failed to account. The appellees other than Cast were the sureties upon the bond. Issues were formed, and the cause was submitted to the court for trial. A special finding was made at the request of the appellant, and the conclusions of law were in favor of the appellees. Exceptions to the conclusions of law were duly reserved, and a motion for a new trial was made by the appellant and overruled by the court. Judgment for the appellant for \$49.78.

The errors assigned and not waived by failure to discuss them are the conclusions of law and the ruling of the court upon the motion for a new trial. The point made under the several assignments is that the amount of the recovery is too small.

It appeared from the proof that the appellee Cast had been the secretary of the association for eight years, and that in each year he had been a defaulter. The bond supposed to have been given by Cast for three years of the time he served as secretary could not be found. When it was discovered that the secretary had embezzled the moneys of the association, he and his wife conveyed to it certain real estate by deed, and he also turned over a small amount of stock in the association. One of the sureties on the bond in suit made a payment on account of the amount due.

It is contended by the appellant that no special direction was given by Cast as to the application of the payments made by him by the transfer of his property, and that it had the right to apply such payments to the unsecured claims against Cast. The appellees insist that the property was conveyed to the association for the purpose of paying the claims for which the securities were liable, and that the unsecured debts were not embraced in the arrangement. Counsel for appellant assert that the question of the

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right of the appellant to make the application of the payments is one of law; counsel for the appellees contend that it is one of fact.

There was evidence that the transfer of property was made for the benefit and protection of the sureties, and this being the case, we can not say that the court erred in its finding on that branch of the case, or that such finding was not sustained by sufficient evidence. The conclusions of law were fully warranted by the findings of fact.

There is no error in the record. Judgment affirmed.

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10. *Bill of Exceptions.—Evidence.—Record*—The evidence can not be considered on appeal, where what purports to be a bill of exceptions embracing the evidence does not appear to have been presented to the judge for signature within the time allowed by the court. *Indiana, etc., Oil Co. v. O'Brien, 266.*
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14. *Record.—Original Bill of Exceptions.*—The act of 1878 (Acts 1878, p. 194), by which the original bill of exceptions containing the evidence could be embraced in the transcript without copying the same, was repealed by §1477 Burns 1901.
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30. Where appellant failed to set forth in its brief a copy of the complaint, or the substance thereof, and the demurrer thereto as required by clause five of rule twenty-two of the Supreme Court, an assignment based upon the action of the court in overruling the demurrer to the complaint will be deemed waived.
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Perry, etc., Stone Co. v. Wilson, 435.
32. Under rules twenty-one and twenty-two of the Supreme Court requiring an appellant to file his brief within sixty days after the submission of the cause and state therein the errors relied upon for reversal, points not stated therein are waived and cannot be presented in a brief subsequently filed purporting to contain a citation of additional authorities. *Consumers Paper Co. v. Eyer, 424.*
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37. *Error Induced by Appellant.*—Appellant will not be heard to complain of the action of the court in submitting a cause of equitable cognizance to a jury, where the cause was so submitted at the instance of appellant and over the objection and exception of appellee. *Thorne v. Cosand, 566.*
38. *Special Finding.—Silence of Finding.*—The silence of the special finding will be considered on appeal as equivalent to an express finding against the appellant on all material facts which it was obliged to prove. *State Bank v. Backus, 682.*
39. *Struck Jury.—Presumption.*—Where under a demand for a struck jury it appears that the clerk of the court took forty of the names in the list made and filed by the jury commissioners from which a jury was struck, it must be held on appeal, nothing to the contrary being shown, that the clerk adopted said forty names as his own selection, under §525 R. S. 1881. *Mankin v. Pennsylvania Co., 447.*
40. *Evidence.—Conflict.*—The fact that there is no conflict in the evidence on one or more essential facts furnishes no ground for the reversal of a judgment in favor of defendant, where there is a sharp conflict as to certain other facts which plaintiff was required to establish before he was entitled to a verdict. *Williams v. Chapman, 130.*
41. *Harmless Error.*—Overruling a demurrer to a bad answer is harmless, where all the matters pleaded were provable under the general denial. *Goode v. Elwood Lodge, etc., 251.*
42. Where the special findings set out sufficient facts to warrant a decree under the amended second paragraph of complaint, error, if any, in sustaining a demurrer to the first paragraph of complaint, was harmless. *Muncie Nat. Gas Co. v. City of Muncie, 97.*
43. *Harmless Error.—Instructions.—Insurance.*—Under §670 Burns 1901, that a judgment shall not be reversed "where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below," the Supreme Court will not reverse a judgment against an insurance company because of an instruction without the issues on the question of waiver of proofs of loss, where under the evidence no other conclusion could have been reached on the question of waiver than that reached by the jury. *Germania Fire Ins. Co. v. Pitcher, 392.*
44. *Harmless Error.—Misconduct of Counsel.*—Alleged misconduct of counsel in suggesting to the jury, in argument, that certain interrogatories should be answered by the words "No evidence," was harmless, where affirmative answers to such interrogatories would not have created an irreconcilable conflict between the answers to interrogatories and the general verdict. *Consumers Paper Co. v. Eyer, 424.*
45. *Waiver.*—Questions not discussed are waived. *Clear Creek Stone Co. v. Dearmin, 162; Smith v. Borden, 223.*
46. *Motion to Quash Summons.—Answer.—Waiver.*—Defendant in a mandamus proceeding did not waive the right to present for review the action of the court in overruling a motion to quash the summons by afterward filing a demurrer and an answer to the merits of the cause. *Board, etc., v. Moubray, 10.*

APPELLATE COURT—Appeal from, see **APPEAL AND ERROR** 1, 2; *Smith v. American, etc., Co., 141.*

ASSAULT AND BATTERY—See **CRIMINAL LAW**.

When felonious intent may be inferred, see **CRIMINAL LAW**, 2;
Starr v. State, 661.

ASSESSMENTS—For street improvements, see **MUNICIPAL CORPORATIONS**, 20; *Laakmann v. Pritchard*, 24.**ASSIGNMENT OF ERROR**—See **APPEAL AND ERROR**.**ASSIGNMENTS**—Written assignment of claim as evidence, see **EVIDENCE**, 18; *Boseker v. Chamberlain*, 114.**ASSUMPTION OF RISK**—See **MASTER AND SERVANT**.**ATTORNEY**—Misconduct as cause for new trial, see **TRIAL**, 8-8;
Consumers Paper Co. v. Eyer, 424; *Consolidated Stone Co. v. Morgan*, 241; *Perry, etc., Stone Co. v. Wilson*, 435.**ATTORNEY'S FEES**—In action to recover penalty for failing to satisfy a mortgage, see **MORTGAGES**, 5; *Osborn v. Hocker*, 1.

Recovery of in action for penalty for noncompliance with monthly payment wage law, see **MASTER AND SERVANT**, 1; *Toledo, etc., R. Co. v. Long*, 564.

Allowance in criminal case beyond amount of appropriation, see **COUNTIES**, 4; *Board, etc., v. Mowbray*, 10.

BAILIFF—Presence of bailiff with jury, see **TRIAL**, 1; *Shular v. State*, 300.**BILL OF EXCEPTIONS**—See **APPEAL AND ERROR**.**BILLS AND NOTES**—See **ALTERATION OF INSTRUMENTS**.

Agreement to Use for Special Purpose.—Breach of Agreement.—Principal and Surety.—Where defendant executed as surety two promissory notes under an agreement with the principal and payee thereof that the notes should be given in payment of certain articles purchased of payee, and such notes were applied to a different purpose, without the knowledge of the surety, the surety waived his right of defense thereto by executing new notes in renewal of the old ones with a knowledge that the old notes had not been used for the purpose for which they were executed.

Baut v. Donly, 670.

BONDS—Action on official bond, see **EXTORTION**; *State, ex rel., v. Bagby*, 669.**BRIEFS**—Failure to comply with rules of Supreme Court as to form of, see **APPEAL AND ERROR**, 28-32; *Given v. State*, 552; *Boseker v. Chamberlain*, 114; *Security, etc., Assn. v. Lee*, 249; *Perry, etc., Stone Co. v. Wilson*, 435; *Consumers Paper Co. v. Eyer*, 424.**CARRIERS**—

Negligence.—Complaint.—A complaint against a carrier for injury to a passenger alleging that the train was so negligently managed that while running at a speed of ten miles an hour it was brought to a sudden stop and thereby with great force and violence threw plaintiff from his seat against the wall and floor of the car, states a cause of action, since it was the sudden stopping of the car that was complained of, not the speed thereof.

Baltimore, etc., R. Co. v. Harbin, 441.

CASES—See OVERRULED CASES.

For table of cases cited, see page vi.

CERTIORARI—

Free Gravel Roads.—A writ of *certiorari* will not lie to review the proceedings of the board of commissioners in the establishment of a free gravel road on the petition of a remonstrant alleging that the petition for the construction of the road was not signed by the requisite number of qualified freeholders.

Gifford v. Board, etc., 654.

CHANGE OF VENUE—See VENUE.

CHARACTER—Of widow in action for death of husband, see EVIDENCE, 1; *Consolidated Stone Co. v. Morgan*, 241.

CITIES—See MUNICIPAL CORPORATIONS.

CITY ATTORNEY—Removal of, see MUNICIPAL CORPORATIONS, 7-9; *Downey v. State, ex rel.*, 578.

COLLATERAL ATTACK—Vacation of judgment, see JUDGMENTS, 4; *Frankel v. Garrard*, 209.

COMPROMISE AND SETTLEMENT—

1. *Executors and Administrators.—Damages.—Death by Wrongful Act.*—The provisions of §§2454, 2456 Burns 1901, relative to the collection and compounding of debts by an administrator do not apply to the compromise of a demand made by an administrator for the death of his decedent by wrongful act, and the administrator in such case may compromise the claim without order of court.

Pittsburgh, etc., R. Co. v. Gipe, 360.

2. *Executors and Administrators.—Damages.—Death by Wrongful Act.—Railroad Relief Association.*—Where a widow who was administratrix of her husband's estate and beneficiary in a railroad relief fund certificate upon the life of her husband, which provided that the acceptance of benefits from the relief fund should operate as a release of all claims for damages against the railroad company, accepted the amount of the death benefit certificate and signed a receipt as widow and beneficiary, also as administratrix, in full satisfaction of all claims and demands against the relief association and railroad company on account of the death of the deceased, such receipt pleaded in answer to an action by the administratrix against the railroad company for the death of decedent constituted *prima facie* a bar, not only to the claim of the widow, but also to a recovery for the benefit of the children of the deceased.

Pittsburgh, etc., R. Co. v. Gipe, 360.

CONSTITUTIONAL LAW—Amendment of statutes, see STATUTES, 1, 2; *Mankin v. Pennsylvania Co.*, 447.

Constitutional question on appeal, see APPEAL AND ERROR, 8; *Consumers Paper Co. v. Eyer*, 424.

1. *Weekly Wage Law.*—The act of 1899 (Acts 1899, p. 193) providing for the weekly payment of wages and imposing a penalty for the violation thereof is an unreasonable restriction upon the freedom of contract, and is unconstitutional and void.

Republic Iron & Steel Co. v. State, 379.

2. *Weekly Wage Law.—Title.—Penalty.*—The penalty clause of the act of 1899 (Acts 1899, p. 193) providing for the weekly payment of wages is not void because no mention thereof is made in the title of the act.

Republic Iron & Steel Co. v. State, 379.

CONSTITUTIONAL LAW—Continued.

3. *Minimum Wage Law.—Work and Labor.*—The minimum wage law (§§7055a, 7055b Burns 1901), fixing a minimum rate of wages to be paid unskilled labor employed upon any public work of the State, counties, cities, and towns, is unconstitutional, being violative of §1 of the fourteenth amendment of the federal Constitution and also §§1 and 23 of article 1 of the state Constitution.
Street v. Varney Electrical Sup. Co., 338.
4. *Work and Labor.—Assignment of Wages.—Master and Servant.*—The act of 1899 (Acts 1899, p. 193, §§7059, 7059c Burns 1901), prohibiting the assignment by employes of future wages, is not unconstitutional as placing an unreasonable restraint upon the right of a citizen to contract in violation of §1, article 1, of the state Constitution, or that it deprives any person of property without due process of law in violation of §1 of the fourteenth amendment of the federal Constitution.
International Text-Book Co. v. Weissinger, 349.
5. *Legislation for Public Safety.—Deprivation of Property.*—A legislative act for the protection of the public is not invalidated because it results in the deprivation of property. *Given v. State*, 552.
6. *Police Power.—Public Safety.—Gas Wells.*—If the natural gas escaping from wells is dangerous to persons and property in the vicinity, the legislature, in the exercise of its police power, has the right to regulate the sinking and casing of wells.
Given v. State, 552.
7. *Indeterminate Sentence Law.—Criminal Law.*—The indeterminate sentence law is constitutional.
Shular v. State, 300.

CONTINUANCE—

Absent Witness.—Admissions.—Defendant asked a continuance to enable him to procure the testimony of an absent witness. To avoid a postponement of the trial, plaintiff admitted that if present the witness would testify to the material facts set forth in defendant's affidavit in support of his motion. *Held*, that plaintiff's admissions did not embrace statements of conclusions set forth in the affidavit.
Indiana R. Co. v. Maurer, 25.

CONTRACTORS—Liability of for personal injuries, see **MUNICIPAL CORPORATIONS**, 10; *City of Anderson v. Fleming*, 597.

CONTRACTS—See SALES.

Act prohibiting assignment of wages, see **CONSTITUTIONAL LAW**, 4; *International Text-Book Co. v. Weissinger*, 349.

Freedom of contract as to wages, see **CONSTITUTIONAL LAW**, 1; *Republic Iron & Steel Co. v. State*, 379.

Promise to answer for debt of another, see **FRAUDS, STATUTE OF**; *Indiana Trust Co. v. Finitzer*, 647.

Breach of contract for public improvements, see **MUNICIPAL CORPORATIONS**, 19; *McKee v. City of Greensburg*, 378.

A trust in personal property or money may be created by parol, see **TRUSTS**, 1; *Stanley's Estate v. Pence*, 636.

1. *Mining Lease.—Mutuality.*—A coal mining lease which provides that the mine shall be opened within one year from the date of the lease, and shall not be closed down for more than a year at a time; that the lessor shall receive 500 bushels of coal each year

CONTRACTS—Continued.

- and a certain sum of money for each ton of coal mined, is enforceable by the lessor, and, therefore, not invalid for want of mutuality. *Ingle v. Bottoms*, 73.
2. *Good-Will.—Merger.*—A contract whereby plaintiff in consideration of the sale of certain property and business agreed not to engage in the business while defendant was engaged therein is not merged in a subsequent agreement in which defendant sold the business and good-will to plaintiff, the latter contract having reference only to the future. *Adams v. Adams*, 61.
3. *Customs and Usages.—Evidence.*—In an action to recover the purchase price of certain elm strips "1½ x 1 x 7 ft. long," ordered by defendant of plaintiff, it was proper to allege and prove a custom and usage among lumbermen in the locality that the dimensions of the strips were to be taken at the time they were sawed in the green and with knowledge that the strips would shrink when dried. *Rastetter v. Reynolds*, 133.
4. *Finding.—Judgment.*—In an action to recover for gas furnished, the contract provided that defendant should pay \$30 per day until meters were installed, and thereafter seven cents per thousand feet. It also provided that if the reading of the meters showed the value of the gas to be more than \$30 per day the defendant should pay the difference, and if less than \$30 per day, the plaintiff should credit defendant for the excessive payment. The complaint alleged that it was the intention and agreement of the parties that plaintiff was only to supply gas to three puddling furnaces, but by mistake of the scrivener such provision was omitted and defendant took gas for three additional furnaces by secretly opening a stopcock and thereby supplied six furnaces instead of three, and claimed for gas used in the three other furnaces an additional sum of \$20 per day, and as no meters were used plaintiff was unable to state the number of feet of gas consumed. The court found that defendant used 19,737,000 cubic feet of gas worth seven cents per thousand feet and rendered judgment accordingly, without any finding that defendant used any gas not embraced within this contract. *Held*, that the finding by the court of the quantity of gas used, and its value, was not within the issues, and the judgment was erroneous and excessive. *Palmer Steel & Iron Co. v. Heat, Light & Power Co.*, 232.

CONTRIBUTORY NEGLIGENCE—At railroad crossings, see **RAILROADS**, 1; *Stoy v. Louisville, etc., R. Co.*, 144.

Not necessary for plaintiff to allege and prove freedom from contributory negligence in suit for malpractice, see **PHYSICIANS**, 2; *Aspy v. Botkins*, 170.

CORPORATIONS—

Organization.—Specification of Unauthorized Powers.—De Facto Corporation.—Collateral Attack.—Where persons desiring to organize a corporation under a particular statute attempt in good faith to comply with the terms of the statute, but by mistake in naming the objects of the corporation include more than the statute authorizes, the organization is a *de facto* corporation, and its legality as a corporation is not open to a collateral attack.

Marion Bond Co. v. Mexican Coffee & Rubber Co., 553.

CORPUS DELICTI—Proof of in prosecution for producing criminal abortion resulting in the death of the woman, see **CRIMINAL LAW**, 11; *Seifert v. State*, 464.

COUNTIES—

1. *Officers.—Unlawful Allowances.—Recovery.—Parties.—Suit by Taxpayer.*—Suit may be maintained by resident taxpayers of the county against the county auditor for the recovery, for the benefit of the county, of money wrongfully allowed by the board of commissioners and unlawfully paid to the county auditor in excess of the salary, fees, and compensation to which he was entitled under the statute, where the board of commissioners was requested by plaintiffs to bring the action, and refused to do so.
Zuelly v. Casper, 455.
2. *County Board of Review.—County Auditor.—Compensation.*—The act of 1895 (Acts 1895, p. 74) provides that the county board of review "shall be composed of the county assessor, county auditor and county treasurer, and two freeholders to be appointed by the judge of the circuit court, who shall each be paid out of the county treasury, the sum of \$3 for each and every day while they are acting as members of said board." *Held*, that the county auditor is entitled to the *per diem* compensation the same as other members of the board who are not county officers.
Seiler v. State, ex rel., 605.
3. *County Board of Review.—County Auditor.—Compensation.—Statutes.—Repeal.*—The act of 1895 (Acts 1895, p. 74), fixing a compensation of \$3 a day to county auditors for services on the board of review, is not repealed by the fee and salary law of 1895 (Acts 1895, p. 319) enacted ten days thereafter, nor does such later act require a county auditor to tax and charge the amount which he was allowed, under the former statute, for his services as a member of the board of review, as a fee in favor of the county, and when the money was received by him, to return it to the treasurer as the property of the county.
Seiler v. State, ex rel., 605.
4. *County Reform Law.—Attorney's Fees.—Allowance by Court.—Mandamus.*—Under §5594g1 Burns 1901 courts have no power to bind the county for attorney's fees for services rendered in criminal cases beyond the amount of the existing appropriation for that purpose, and an action will not lie against the county to recover for services in such case and to compel the county council by mandate to make an appropriation to pay the same and the county auditor to issue a warrant therefor.
Board, etc., v. Mowbray, 10.

COUNTY AUDITOR—Entitled to *per diem* compensation for services on board of review, see COUNTIES, 2, 3; *Seiler v. State, ex rel., 605.*

Action against by taxpayer to recover unlawful allowance, see COUNTIES, 1; *Zuelly v. Casper, 455.*

COURTS—See APPELLATE COURT; FEDERAL COURT; SUPREME COURT.

Construction of Act Changing Term.—Section 1 of the act of March 9, 1903, provides that "hereafter the circuit court in Fountain county shall begin on the last Monday in August of each year and continue for five weeks." Section 2 is an emergency clause. *Held*, that the act does not change the time of holding court in said circuit until the last Monday in August, which was the beginning of the court year under said act.
Rabb v. McAdams, 492.

CRIMINAL LAW—See ABORTION.

Presence of bailiff in jury room, see TRIAL, 1; *Shular v. State, 300.*

The indeterminate sentence law is constitutional, see CONSTITUTIONAL LAW, 7; *Shular v. State, 300.*

CRIMINAL LAW—Continued.

1. *Evidence.—Assault and Battery With Intent to Commit Rape.*—No error was committed in permitting a witness to testify in a prosecution for assault with intent to commit rape as to whether the prosecuting witness directly thereafter made complaint of the assault and battery perpetrated upon her. *Shular v. State, 300.*
2. *Assault and Battery.—Felonious Intent.*—Where, in a prosecution for assault and battery, with intent to commit murder, the evidence showed that defendant, without provocation, attacked prosecuting witness with a hatchet, inflicting a dangerous wound on his head and face, the jury were authorized to infer that the assault was made with felonious intent. *Starr v. State, 661.*
3. *Evidence.—Proof, in a prosecution for assault and battery with intent to commit murder, of a declaration made by defendant just prior to the assault, while driving along the highway behind the prosecuting witness and his brother, that "he would kill the son of a bitch," was not improper because no person was designated as the object of the threat.* *Starr v. State, 661.*
4. *Evidence.—Res Gestae.*—Where, in a prosecution for assault and battery with intent to commit murder, it appeared that defendant simultaneously assaulted the prosecuting witness and his brother with a hatchet, it was not error to permit a witness to testify that just after the assault he saw the brother lying on a snow drift, alongside the road, with a gash somewhere upon him, and the prosecuting witness, with a cut on his temple, standing between him and their buggy. *Starr v. State, 661.*
5. *Assault and Battery With Intent to Commit Rape.—Evidence.*—In a prosecution for assault and battery with intent to commit rape, the prosecuting witness testified that as she was going to her home in the night-time she saw two men standing in a stairway between two saloons; that one of them followed her, demanded to know where she was going, caught hold of her and began to pull her, saying, "Come on with me;" that she resisted, and attempted to give an alarm, and he choked her, and struck her, and let her go. A witness testified that he was standing at the place indicated by the prosecuting witness, on the night in question, with defendant, and saw a woman pass; that defendant followed her, using such language as to indicate his intent to have carnal intercourse with her, forcibly and against her will if necessary. The prosecuting witness shortly after the assault and while she was in a nervous condition accused another as her assailant, but afterward identified defendant. *Held*, that the evidence was sufficient to sustain a conviction for an assault and battery with the felonious intent to commit rape. *Shular v. State, 300.*
6. *Assault and Battery.—Instruction.—Self-Defense.*—An instruction in a prosecution for assault and battery with intent to commit murder, that one who provokes, or voluntarily enters into a combat, may not avail himself of the excuse of self-defense, unless he first withdraws from the combat which he has brought on, was not erroneous, where it was authorized by the evidence. *Starr v. State, 661.*
7. *Different Offenses.—Instruction.*—No error was committed in instructing the jury in a prosecution for an assault and battery with intent to commit murder, that if they found from the evidence beyond a reasonable doubt that defendant committed an assault and battery on the prosecuting witness with intent to commit murder in the first degree, or with intent to commit murder in the second degree, or with intent to commit man-

CRIMINAL LAW—Continued.

slaughter, or an assault and battery only, it would be their duty to find him "guilty as charged" where the instruction fully advised the jury as to the penalty to be inflicted and the form of their verdict in case of a conviction of either offense stated.

Starr v. State, 661.

8. *Instruction.—Harmless Error.*—Alleged error of court in explaining to the jury in an instruction the premeditated malice which is a necessary ingredient of murder in the first degree, and of an assault and battery with intent to commit that crime, and the unpremeditated purpose to kill which enters into the crime of manslaughter, and into an assault and battery with intent to commit that offense, was not prejudicial to defendant, where he was convicted of assault and battery with intent to commit manslaughter.
Starr v. State, 661.
9. *Instruction.—Assault and Battery With Intent to Commit Rape.*—Where in a prosecution for assault and battery with intent to commit rape it appeared that the prosecuting witness shortly after the assault identified a person other than defendant as the guilty one, it was not error for the court to instruct the jury that in the event they found that she had identified such other person as the guilty one, they had the right to take into consideration her condition, surroundings, and all the facts and circumstances shown to exist at the time she made such identification.
Shular v. State, 300.
10. *Abortion.—Principal.—Absence of Principal.*—One who procures an instrument for a woman, which he advises and directs her to use upon herself to produce a criminal abortion, may be convicted as principal, where the woman, pursuant to such advice and direction, uses the instrument for such purpose, though in the absence of the former, thereby causing her to miscarry and die.
Seifert v. State, 464.
11. *Abortion.—Corpus Delicti.—Evidence.*—In a prosecution for producing criminal abortion resulting in the death of the woman, evidence showing the abortion, and the death as a result thereof, that there were two openings from the uterus into the abdominal cavity, that there was a delay in calling a physician, and statements of deceased of her purpose to get rid of the child, was sufficient to establish the *corpus delicti*.
Seifert v. State, 464.
12. *Abortion.—Dying Declarations.—Evidence.*—Dying declarations of the woman, in a prosecution for criminal abortion resulting in death, to the effect that when she told defendant that she was pregnant by him, he promised to relieve her, and brought her the instrument with which she produced the abortion and told her to use it, were admissible as relating to the circumstances of the death.
Seifert v. State, 464.
13. *Indictment.—Petit Larceny.—Description of Property Stolen.*—An indictment for petit larceny describing the property stolen as "five dollars of the personal goods and chattels of," etc., is insufficient at common law, and is bad under §1819 Burns 1901, for failure to show that the property stolen consisted of five dollars in money.
Whitson v. State, 510.
14. *Evidence Before Grand Jury.—Continuation After Return of Indictment.*—A defendant can not complain of the action of the grand jury in continuing to hear evidence as to matters of defense after returning an indictment against him, although it appears as a result of such a course that the witnesses that he afterwards calls are contradicted by their testimony before the grand jury.
Coppenhaver v. State, 540.

CRIMINAL LAW—Continued.

15. *Order for Examination of Defendant.*—Where defendant who was in jail charged with the crime of murder petitioned the court that a personal examination of himself be made by physicians for the purpose of ascertaining his mental condition, he was not prejudiced by a condition in the order that the examination should be made in the presence of the jailer, it not appearing that the jailer communicated any information thus obtained to the prosecuting attorney.
Coppenhaver v. State, 540.
16. *Examination of Juror.—Conscientious Scruples as to Death Sentence.*—Where a juror on his *voir dire* was asked by the prosecuting attorney whether he had any conscientious scruples against sentencing a man to suffer death, answered that he had not, no error was committed in permitting the prosecuting attorney to ask him further whether, if he should find from all the evidence in the case that defendant was guilty as charged, he could as readily vote to sentence him to death as to life imprisonment, if he thought the facts warranted such a finding.
Coppenhaver v. State, 540.
17. *Trial.—Opening Statement.—Misconduct of Counsel.*—In a criminal case where the jury is the judge of the law as well as the facts, it is proper to make a sufficient statement of the law, upon the opening, to enable the jury to appreciate the evidence as it is adduced.
Coppenhaver v. State, 540.
18. *Trial.—Misconduct of Counsel.*—No error was committed in the trial of a criminal cause in overruling a motion to set aside the submission because of alleged misconduct of counsel in his opening statement to the jury that certain threats preceding the murder amounted to express malice, since if it was proper for the court to interfere at all it should have been on motion to withdraw the statement and admonish the jury not to consider it.
Coppenhaver v. State, 540.
19. *Trial.—Misconduct of Counsel.*—A witness who had made the arrest was asked by the defense on cross-examination whether he had ever before known of a person surrendering himself who had committed a crime punishable by death. The witness answered that he had known of one such instance, giving the name. He was then asked whether such person had not been found insane on a trial for murder, to which question an objection was sustained. While counsel for defense was making an offer to prove, the prosecuting attorney asked the witness, in a whisper, if he remembered the sentence of such person, naming the town where he was tried, and the attorney for defense moved to set aside the submission of the cause, assigning as a reason that the prosecuting attorney had prompted the witness. *Held*, that the motion was properly overruled.
Coppenhaver v. State, 540.
20. *Trial.—Instruction.—Defense of Insanity.*—An instruction offered in the trial of a criminal cause in which the plea of insanity was interposed as a defense that the words "of unsound mind" as used in the statute include every species of mental unsoundness, arising from whatsoever cause, and must be taken to mean any idiot, *non compos*, lunatic, or monomaniac, or distracted person, that the law recognizes but two classes of persons, the sane and the insane, was misleading and properly rejected.
Coppenhaver v. State, 540.
21. *Trial.—Instruction.—Defense of Insanity.—Instructions as to Proceedings After Acquittal.*—It was not error for the court in the trial of a criminal cause in which the defense of insanity was made to refuse to instruct the jury as to the procedure which follows in

CRIMINAL LAW—Continued.

the event a person charged with a crime is acquitted on the sole ground that he was insane at the time of the commission of the act.
Copenhagen v. State, 640.

22. *Incorrect Instruction.—Use of "Consistent" Instead of "Inconsistent."*—An instruction on circumstantial evidence, given to the jury in a criminal prosecution, that "the proof must not only coincide with the hypothesis of guilt, but it must be consistent with every other reasonable conclusion" was erroneous, and prejudicial error.
Hampton v. State, 675.

23. *Verdict.—Failure to Find Age of Defendant.—Indeterminate Sentence Law.*—The absence of a finding in a verdict of conviction of felony as to the age of the defendant as provided by §1906b Burns 1901, will not vitiate the verdict, and the court had the right to assume in assessing the punishment that the defendant was not of an age to entitle him to be confined in the reformatory instead of the state prison.
Boone v. State, 678.

24. *Appeal and Error.—Evidence.*—The Supreme Court is not warranted in disturbing a judgment in a criminal prosecution unless there is such an absence of evidence in respect to some fact or element material to the crime charged as to present a question of law, which, under the circumstances, must be decided in favor of the convicted party.
Shular v. State, 300.

CUSTOMS AND USAGES—In measurement of lumber, see **CONTRACTS**, 3; *Rastetter v. Reynolds, 133.*

1. *Extent.*—Commercial usages need not be coextensive with the State.
Rastetter v. Reynolds, 133.

2. *Contracts.*—To authorize the proof of a commercial usage or custom in explanation of a contract it is not necessary that the usage should have existed for any considerable length of time, but it is sufficient if it was known to the parties at the time they entered into the contract.
Rastetter v. Reynolds, 133.

3. *Evidence.*—In an action for the purchase price of certain lumber, plaintiff alleged a custom or usage among lumbermen that the dimensions of the lumber were to be taken at the time it was sawed, and proved the same by a number of witnesses. It was also shown that plaintiff had sawed and shipped two car loads of similar lumber to defendant prior to the controversy, and that all was the same thickness as that delivered under the order in this case, and was sawed in the green of the dimensions ordered, and accepted by defendant. *Held*, to support a finding that the custom was known to defendant. *Rastetter v. Reynolds, 133.*

DAMAGES—Action for damages for personal injuries, see **MUNICIPAL CORPORATIONS**, 10; *City of Anderson v. Fleming, 597.*

Compromise of claim for death by wrongful act, see **COMPROMISE AND SETTLEMENT**, 1, 2; *Pittsburgh, etc., R. Co. v. Gipe, 360.*

Death by Wrongful Act.—Marriage of Decedent's Widow.—No error was committed in instructing the jury in an action for damages for death by wrongful act that the marriage of the decedent's widow should not be considered by them in assessing the damages, if damages should be given. *Consolidated Stone Co. v. Morgan, 241.*

DEATH BY WRONGFUL ACT—See **MASTER AND SERVANT**, 17-20; *Consolidated Stone Co. v. Morgan, 241.*

DEATH BY WRONGFUL ACT—Continued.

Measure of damages not changed by marriage of decedent's widow, see **DAMAGES**; *Consolidated Stone Co. v. Morgan*, 241.

Compromise of claim for damages, see **COMPROMISE AND SETTLEMENT**, 1, 2; *Pittsburgh, etc., R. Co. v. Gipe*, 360.

Evidence of habits and moral character of widow properly excluded, see **EVIDENCE**, 1; *Consolidated Stone Co. v. Morgan*, 241.

DECEDENTS' ESTATES—See **EXECUTORS AND ADMINISTRATORS**.

DECLARATIONS—Of third party, see **EVIDENCE**, 9; *Indianapolis St. R. Co. v. Whitaker*, 125.

DEEDS—Withholding deed from record, see **FRAUDULENT CONVEYANCES**, 1, 2; *State Bank v. Backus*, 682.

Mental capacity of grantor, see **GIFTS**; *Thorne v. Cosand*, 566.

1. *Execution.—Unsoundness of Mind of Grantor.—Undue Influence.*—An instruction that children have no natural or legal rights to the estate of their ancestors which can be asserted against the disposition of the same by the ancestors, the ancestors being free from undue influence, and of sufficient mental capacity, was proper in a suit by children to set aside a conveyance made by their mother on the ground of unsoundness of mind and undue influence. *Thorne v. Cosand*, 566.

2. *Delivery.—Trial.—Finding.*—A finding that a vendor, under an executory contract for the conveyance of real estate upon the payment of the purchase money, filed, with his complaint to foreclose, the deed he had previously prepared and tendered to the purchaser for the use of the latter, upon his payment of the purchase money, and that soon after the filing, without the consent of vendor, and without paying anything on the notes, the vendee took the deed from the clerk's office and lodged it for record in the recorder's office, and that there was no further delivery, sufficiently shows that there was no delivery of the deed.

Schaefer v. Purviance, 63.

DELIVERY—Of deed, see **DEEDS**, 2; *Schaefer v. Purviance*, 63.

DEMAND—When implied from pleading, see **PLEADING**, 17; *Whitcomb v. Stringer*, 82.

DEMURRER—For insufficiency of facts questions the right of plaintiffs to sue jointly, see **PLEADING**, 14; *Frankel v. Garrard*, 209.

For defect of parties means too few, not too many parties, see **PLEADING**, 10-13; *Frankel v. Garrard*, 209; *Boseker v. Chamberlain*, 114.

Misjoinder of parties is not a ground of demurrer, see **PLEADING**, 11; *Frankel v. Garrard*, 209.

Separate demurrer of codefendant, see **PLEADING**, 15; *Frankel v. Garrard*, 209.

DITCHES—See **DRAINS**.

DIVORCE—

1. *Notice by Publication.—Vacation of Decree.—Fraud.*—A decree for divorce against a nonresident defendant will not be set aside for

DIVORCE—Continued.

fraud on the part of the plaintiff in making affidavit that the place of defendant's residence was unknown to her, where it appears that the defendant was in fact a nonresident, and that the notice by publication was made according to law.

Day v. Nottingham, 408.

2. In a suit for divorce against a nonresident, an affidavit by the plaintiff instead of by a disinterested person, as provided by §1048 Burns 1901, will not render a decree for plaintiff void for want of jurisdiction.

Day v. Nottingham, 408.

3. *Setting Aside Decree After Plaintiff's Death.*—The provision of §1042 Burns 1901, that "Parties against whom a judgment of divorce shall hereafter be rendered, without other notice than publication in a newspaper, may, at any time within two years after the rendition of such judgment, have the same opened, and be allowed to defend as well on the granting of the divorce as in relation to the allowance of alimony and the disposition of property," has no application where the party obtaining the divorce upon a citation to the defendant by publication is dead at the time the application to open the judgment is made, and where no question of alimony or property rights was involved in the divorce proceeding.

Day v. Nottingham, 408.

4. *Residence of Plaintiff.—Witnesses.—Qualification.*—A divorce decree will be reversed on appeal where there was no evidence that the witnesses as to the residence of plaintiff were resident freeholders and householders of the State as required by §1048 Burns 1901.

Becker v. Becker, 407.

DRAINS—

1. *Benefit to Highway.—Township a Party to Proceeding.*—In a drainage proceeding under §5823 Burns 1894, where a civil township is joined as a party because of alleged benefits of the proposed drain to public highways, such highways need not be specifically described, since the benefits assessed against the township are not a lien on the highway, but a debt payable by the township.

Pleasant Tp. v. Cook, 533.

2. *Commissioners' Final Report.—Notice.*—Where a township is joined as a party in a drainage proceeding because of alleged benefits to highways, such township is not entitled to notice of the filing of the final report of the commissioners.

Pleasant Tp. v. Cook, 533.

3. *Report of Commissioners.—Judgment.*—Where, in a drainage proceeding under the drainage act of 1885 as amended by the act of 1889, the court has jurisdiction of the subject-matter and of the parties, the judgment confirming the report of the commissioners is final and conclusive.

Pleasant Tp. v. Cook, 533.

4. *Levee.*—The act of 1891 (Acts 1891, p. 455, §5690 *et seq.* Burns 1901), authorizing the board of county commissioners to cause to be located and constructed, straightened, widened, altered or deepened, any ditch, drain, or watercourse of the length of five miles or more when the same is necessary to drain any lots, lands, public or corporate roads, or railroads, and providing that the petition therefor shall include any side, lateral, spur or branch ditch, drain, or watercourse, the lowering of any lake or other work necessary to secure fully the object of the improvement petitioned for, whether the same is mentioned or not in such petition, does not authorize the building of a levee, where the same is not a mere incident to the construction of the drain, but is rather the principal improvement.

Royse v. Evansville, etc., R. Co., 592.

5. Where a petition for the construction of a ditch included the construction of a levee which the court held was not authorized

DRAINS—Continued.

by the act under which the proceeding was brought, and such petition treated the entire improvement as a unit, and proceeded on the theory that both the ditch and the levee were required to accomplish the desired ends, the court properly dismissed the proceeding instead of referring it back to the viewers with instructions to amend their report so as to limit the proceeding to the construction of a ditch. *Royse v. Evansville, etc., R. Co., 592.*

DYING DECLARATIONS—Instruction as to weight of, see EVIDENCE, 5; *Seifert v. State, 464.*

EASEMENTS—

Extent of Grant.—Where a grant is made, whatever is necessary or essential to the enjoyment of the grant is also granted.

Ingle v. Bottoms, 73.

EMPLOYERS' LIABILITY ACT—See MASTER AND SERVANT, 13-16; *Pittsburgh, etc., R. Co. v. Gipe, 360; Southern Ind. R. Co. v. Martin, 280; Consumers Paper Co. v. Eyer, 424.*

EQUITY—

1. *To Avoid Multiplicity of Suits.*—Where a party is entitled to legal relief, and there exists between him and a number of others entitled to relief a common interest, as against another party that can be determined by one suit, such fact affords a distinct basis for an appeal to equity. *Muncie Nat. Gas Co. v. City of Muncie, 97.*

2. *Reformation of Contract.*—Where, in an action on a contract for gas delivered, the plaintiff sought equitable relief by invoking the aid of the court in correcting and perfecting the written evidence of the contract, the whole case became one of equitable cognizance and it was proper for the court to award whatever relief the plaintiff proved himself entitled to.

Palmer Steel & Iron Co. v. Heat, Light & Power Co., 232.

3. *Jurisdiction.—Title to Office.*—Courts of equity will not interfere to determine questions concerning the appointment or election of public officers or their title to office. *Landes v. Walls, 216.*

4. *Officers De Facto.—Injunction.*—An injunction will not lie to restrain appointees from acting as members of a common council of a city, pending a contest as to title, where the appointees had back of them an ordinance purporting to establish a new ward, which, if valid, would result in vacancies in the common council, and were armed with certificates of appointment from the proper appointing power, had qualified, and had been acting as members of the common council for months before their right to do so was called in question by such proceeding. *Landes v. Walls, 216.*

ESTATES—Rule in Shelley's Case, see WILLS, 3; *Teal v. Richardson, 119.*

ESTOPPEL—Must be pleaded, see PLEADING, 16; *Adams v. Adams, 61.*

Presumption.—Where there is ground for inference or intendment, it will be against the estoppel, and not in its favor.

Taylor v. Patton, 4.

EVIDENCE—Dying declarations, see CRIMINAL LAW, 12; *Seifert v. State, 464.*

Declarations made by defendant prior to an assault, see CRIMINAL LAW, 8; *Starr v. State, 661.*

EVIDENCE—Continued.

Sufficiency of evidence to sustain conviction of an assault and battery with intent to commit rape, see **CRIMINAL LAW**, 5; *Shular v. State*, 300.

As to complaint made by prosecuting witness in prosecution for assault and battery with intent to commit rape, see **CRIMINAL LAW**, 1; *Shular v. State*, 300.

As to defective appliances, see **MASTER AND SERVANT**, 6; *Brazil Block Coal Co. v. Gibson*, 319.

Defendant may in action for personal injuries, under general denial, prove that plaintiff had notice of the danger, though notice is not negatived in complaint, see **NEGLIGENCE**, 2; *Indiana, etc.*, *Oil Co. v. O'Brien*, 266.

Instruction as to weight, see **TRIAL**, 14, 15; *Aspy v. Botkins*, 170; *Winklebleck v. Winklebleck*, 570.

Records of common council, see **MUNICIPAL CORPORATIONS**, 11; *Muncie Nat. Gas Co. v. City of Muncie*, 97.

Offer to prove, see **TRIAL**, 2; *Williams v. Chapman*, 130.

How made part of record, see **APPEAL AND ERROR**, 12-14; *Timmonds v. Twomey*, 123; *Mankin v. Pennsylvania Co.*, 447.

1. *Death by Wrongful Act.—Character of Widow.*—In the trial of an action for death by wrongful act, evidence in regard to the habits and moral character of the widow of decedent was properly excluded. *Consolidated Stone Co. v. Morgan*, 241.
2. *Personal Injuries.—Remedying Defective Appliance After Accident.*—Where in an action for personal injuries to plaintiff while working in a mining shaft, caused by the alleged defective construction of a ring with which a bucket was attached to a rope, witnesses who saw the ring at different times testified differently as to its condition, evidence was properly introduced showing that after the accident the ring was changed by hammering its overlapping ends together. *Brazil Block Coal Co. v. Gibson*, 319.
3. *Personal Injuries.—Re-examination of Witness.*—Where in the trial of an action for personal injuries to plaintiff, while working in a mining shaft, caused by the alleged defective construction of a ring, used in attaching a bucket to a rope for hoisting dirt, defendant on cross-examination asked a witness for plaintiff the size, shape, and capacity of another bucket used in the mine, no error was committed in permitting plaintiff to show on re-examination of such witness, that the ring on the other bucket was welded, while the ring on the bucket which caused the injury was an open ring, the ends thereof overlapping. *Brazil Block Coal Co. v. Gibson*, 319.
4. *Complaint of Pain.*—In an action for personal injuries, evidence that plaintiff complained of pain to one not a physician, and at a time other than the time of the injury, is admissible. *Indiana R. Co. v. Maurer*, 25.
5. *Dying Declarations.—Impeachment.—Abortion.*—Where in a prosecution for producing an abortion resulting in the death of the woman, dying declarations of the woman in which she admitted using a catheter upon her person to produce the abortion were admitted, the court erred in refusing an instruction to the

EVIDENCE—Continued.

effect that in determining what weight should be given to the dying declarations the jury might consider the fact that according to her own admission therein the declarant had used the catheter upon her person to produce an abortion.

Seifert v. State, 464.

6. *Privileged Communications.—Physician and Patient.—Witnesses.—Criminal Law.—Abortion.*—Testimony of a physician, who was called to treat deceased, that after she had consulted him, and he had advised her, she then stated to him that she desired him to perform a criminal abortion upon her person, that he refused to do so, and that she then said that, if he would not aid her, she would use a catheter to produce it herself; that defendant was the father of her child, and had tried to persuade her not to commit an abortion; that he wanted to marry her, but that she was not so situated that she could marry him at the time, was admissible in contradiction of the dying declarations of the deceased that she used a catheter, prior to this conversation, at the direction of defendant, and furnished by him, such communication not being privileged within the meaning of the provisions of §506 Burns 1901, that physicians shall not be competent witnesses as to matters communicated to them as such by patients in the course of their professional business.

Seifert v. State, 464.

7. A statement made by a patient to a physician after the physician had treated her and went to collect his bill, that she was not able to pay it, and, upon being asked if defendant would pay it, said he would not, that he had nothing to do with producing her condition and did not advise her to commit an abortion, was not a privileged communication within the meaning of §506 Burns 1901, and was improperly excluded in a prosecution against defendant for producing an abortion on such woman resulting in her death.

Seifert v. State, 464.

8. *Physical Examination in Presence of Jury.*—In an action by a woman against a physician for negligence in treating an injury to her knee, it was not error for the court to refuse to permit another physician who was testifying as a witness for defendant to examine plaintiff's knee in the presence of the jury, since it would require a quasi public exposure of her person; and the fact that plaintiff subsequently offered to exhibit her knee to the jury did not operate to make the prior ruling improper.

Aspy v. Botkins, 170.

9. *Street Railway Accident.—Re Gestae.—Declaration of Passenger.*—In an action against a street railway company for injuries sustained by a passenger and alleged to have been caused by the sudden starting of the car, it was error to permit another passenger who saw the accident to testify that she stated to the conductor at the time that if he had stopped the car the accident would not have happened.

Indianapolis St. R. Co. v. Whitaker, 125.

10. Utterances and exclamations of participants, or of persons acting in concert, made immediately before or after, or in the execution of an act, which go to illustrate the character of the act, are usually admissible in evidence on the ground that they are a part of the *res gestae*; but the utterance or declaration of a person who sustains no relation to the transaction is not admissible.

Indianapolis St. R. Co. v. Whitaker, 125.

11. *Conversation.—Res Gestae.*—In an action by a trustee in bankruptcy to recover a sum of money alleged to have been received by defendant as preferential, evidence as to a conversation had by the trustee with the bankrupt and with the bankrupt's wife, long

EVIDENCE—Continued.

after the payment made to defendant, was properly rejected, neither the bankrupt nor his wife being a party to the suit.

Goode v. Elwood Lodge, etc., 251.

12. *Gifts.—Mental Capacity of Grantor.*—In a suit to set aside a conveyance of real estate, made for love and affection, by a wife through her son to her husband, on the ground of the mental incapacity of the grantor, evidence by the husband as to statements made by the wife at the time of such conveyance, in connection with those made by her when he previously conveyed the land to her without consideration, was admissible as showing the mental capacity of the grantor at the time of the last conveyance.

Thorne v. Cosand, 566.

13. *Assignment of Claim.—Admission Without Proof of Execution.—Notice.*—The written assignment of a claim sued on is admissible in evidence without proof of its execution, where §478 Burns 1901, providing the manner in which writings material to an action may be rendered competent, has been complied with.

Boseker v. Chamberlain, 114.

14. *Will as Evidence.*—In a suit by an heir, where it is sought to show that certain land held by the other heirs was held in trust for all the heirs of testator, the will of such testator, which tended to support defendants' contention that there was no trust, is admissible in evidence.

Alexander v. Spaulding, 176.

EXCEPTIONS—Joint exception, see **APPEAL AND ERROR**, 22; *Rasletter v. Reynolds*, 133.

EXECUTIONS—

1. *Decedents' Estates.*—The provision of §2484 Burns 1901, prohibiting the institution of proceedings against a decedent's estate for the enforcement of judgments before the end of one year from the death of the decedent, does not apply to cases where the execution was issued in the lifetime of the decedent.

Blumenthal v. Tibbits, 70.

2. *Taxes.—Payment.—Subrogation.*—A complaint alleged that plaintiffs conveyed certain real estate to defendant's husband under an agreement that the latter should pay the taxes accrued thereon, and that plaintiffs were compelled to pay the same; that subsequently a judgment was obtained against defendant's husband by a third person and an execution issued thereon; that after the death of the husband the real estate was sold to the execution plaintiff who transferred his certificate of sale to defendant and she afterward obtained a sheriff's deed to the real estate "and still holds the same by virtue thereof, and not otherwise," and prayed that plaintiffs be subrogated to the former lien for taxes, and that the same be foreclosed against the property so held by defendant. *Held*, that the complaint was bad for failure to allege that defendant had any notice of the claim or lien at the time she purchased the real estate, and that she acquired title free from any prior secret equity.

Blumenthal v. Tibbits, 70.

EXECUTORS AND ADMINISTRATORS—Pleading and proof on claim against estate, see **PLEADING**, 4; *Stanley's Estate v. Pence*, 636.

May compromise claim for death by wrongful act without order of court, see **COMPROMISE AND SETTLEMENT**, 1; *Pittsburgh, etc., R. Co. v. Gipe*, 360.

EXECUTORS AND ADMINISTRATORS—Continued.

Enforcement of judgment against decedent's estate, see EXECUTIONS, 1; *Blumenthal v. Tibbitts*, 70.

Sales of Real Estate.—Time of Return.—The provision of §2512 Burns 1901, that in sales of real estate for the payment of debts the administrator shall make return under oath of his proceedings in the premises, at the next term after such sale, is directory merely as to the time, and such sale is not invalid because all of the proceedings were had at the same term of court.

Custer v. Holler, 505.

EXEMPTIONS—

1. *Debt Must be Founded on Contract.*—Under the provisions of §715 Burns 1901, a resident householder can claim an exemption of his property from sale on execution, or other final process from a court, only when such execution or other process is issued on a judgment for a debt growing out of or founded upon a contract, express or implied.

State, ex rel., v. Morgan, 474.

2. *Money Won at Gaming.*—The judgment defendant, in a suit by the State, under §6678 Burns 1901, to recover, for the benefit of the wife of the loser, money lost at gaming, is not entitled to the benefit of the exemption laws of the State as against an execution on such judgment.

State, ex rel., v. Morgan, 474.

EXTORTION—

Officers.—Action on Bond.—An action on the bond of an officer for extortion will not lie under §6549 Burns 1901, since such section creates only a personal liability. *State, ex rel., v. Bagby*, 669.

FEDERAL COURT—Removal of cause to, see REMOVAL OF CAUSES, 1-4; *Pennsylvania Co. v. Leeman*, 16.

FELLOW SERVANTS—See MASTER AND SERVANT.

FORMER ADJUDICATION—See JUDGMENTS.

Judgment for defendant in action against contractor for personal injury may be pleaded in bar of action against city for same injury, see JUDGMENTS, 8; *City of Anderson v. Fleming*, 597.

FOUNTAIN CIRCUIT COURT—Construction of act changing term, see COURTS; *Rabb v. McAdams*, 492.

FRAUD—In procuring divorce, see DIVORCE, 1-3; *Day v. Nottingham*, 408.

Payment before discovery, see PAYMENT; *Coulter v. Clark*, 311.

Causing false return of summons, see JUDGMENTS, 5; *Frankel v. Garrard*, 209.

1. *Contracts.—Statute of Frauds.*—Representations made by a banker and business man, well known to plaintiff, that stock in a proposed corporation to which certain patent rights were to be transferred would be more valuable than any bank-stock, and that defendant proposed to join plaintiff in the purchase of the patent rights and the organization of a company, made for the purpose of inducing plaintiff to invest in such corporation, when in truth defendant was investing no money, but had a secret arrangement with the promoter whereby he was to receive his stock

FRAUD—Continued.

and a certain sum of money for inducing others to take stock in such concern, are not within the statute of frauds (§6634 Burns 1901), and the contract thereby induced is voidable.

Coulter v. Clark, 311.

2. *Rescission of Sale.—Complaint.—Parties.—Uncertainty.*—A complaint, in a suit to rescind a contract for the sale of corporate stock on the ground of fraud, set forth conduct of the defendants which, if proved, would entitle plaintiff to a rescission, and joined as defendants the necessary or proper parties each of whom, under the allegations, would be required to answer. *Held*, that the complaint was not void for uncertainty as to parties.

Gutheil v. Goodrich, 92.

FRAUDS, STATUTE OF—Representations made as to value of stock in a corporation, see **FRAUD, 1**; *Coulter v. Clark, 311.*

Promise to Answer for Debt of Another.—Husband and Wife.—A wholesale liquor dealer refused to extend credit to a saloon keeper unless the saloon keeper's wife would become responsible. She said, "I am running this business. Send on the goods, and I will be responsible." Thereafter the goods were billed to the wife and charged to her, but the business was conducted in the name of the husband, the license afterward being renewed in his name. *Held*, that the agreement made by the wife was nothing more than a parol promise to answer for the default of her husband, and was void under the statute of frauds.

Indiana Trust Co. v. Finitzer, 647.

FRAUDULENT CONVEYANCE—

1. *Failure to Record Deed.*—The mere fact that a deed executed by a husband to his wife to secure a debt to the wife was withheld from record by the latter to preserve the husband's credit, she knowing that her husband was engaged in a hazardous financial business, will not render the deed invalid as against subsequent unsecured creditors who extended credit to the husband on the faith of his supposed ownership of the property, no dishonesty or fraud on the part of the wife being shown to exist.

State Bank v. Backus, 682.

2. *Failure to Record Deed.—Mortgages.*—The fact that a deed executed by a husband to his wife to secure a debt due the wife was purposely kept off the record, with a fraudulent intent, would not vitiate a subsequent mortgage executed by the husband to his wife in good faith, and upon a valuable consideration, although the new mortgage was intended to secure the debt described in the instrument which was never recorded.

State Bank v. Backus, 682.

GAMING—Judgment for money won at gaming is in tort, see **EXEMPTIONS, 2**; *State, ex rel., v. Morgan, 474.*

GARNISHMENT—Summoning agent of railroad company to answer as to funds in his hands, see **RAILROADS, 3**; *Chicago, etc., R. Co. v. Witt, 680.*

GAS—Fixing price of natural gas, see **MUNICIPAL CORPORATIONS, 15**; *Muncie Nat. Gas Co. v. City of Muncie, 97.*

GAS AND OIL WELLS—

1. *Waste of Gas.—Strict Construction of Statute.*—The act of March 4, 1893, making it a penal offense to permit gas or oil to escape

GAS AND OIL WELLS—Continued.

for a longer period than two days next after the same has been struck, is to be literally construed, since there is nothing in the act itself to show that two days is not sufficient time in which to confine such gas and oil. *Given v. State, 552.*

2. *Escape of Natural Gas.—Literal Construction of Statute.*—In a prosecution for permitting the escape of natural gas in violation of the act of March 4, 1893 (Acts 1893, p. 300), the evidence showed that a well was being drilled for oil, and that after gas was struck the drilling was continued until oil was found; that at any time after the gas began to flow into the well and to escape from it, the gas might have been confined in the well by filling the well with water, and the operation continued until oil was struck, without inconvenience. *Held*, that there was no necessity for more than the statutory time of two days in which to confine the gas, and no absurdity, injustice or oppression would result from a literal construction of the statute *Given v. State, 552.*
3. *Escape of Natural Gas.—Title and Preamble of Act.—Construction.*—The act of March 4, 1893, making it a penal offense to permit the escape of natural gas or oil for a longer period than two days next after the same has been struck, has the following title: "An act concerning the sinking, safety, maintenance, use and operation of natural gas and oil-wells, prescribing penalties, and declaring an emergency." The following is the preamble: "Whereas, great danger to life and injury to persons and property is liable to result from the improper, unsafe, and negligent sinking, maintenance, use and operation of natural gas and oil-wells; therefore," etc. *Held*, that the public safety and not the waste of gas was the main object of the statute. *Given v. State, 552.*

GAS WELLS—Act regulating sinking and casing, see CONSTITUTIONAL LAW, 5, 6, and GAS AND OIL WELLS, 1-3; *Given v. State, 552.*

GIFTS—Mental capacity of donor, see EVIDENCE, 12; *Thorne v. Cosand, 566.*

Deeds.—Mental Capacity of Grantor.—A standard of mental capacity set up in an instruction in a suit to set aside a conveyance, made to a son for love and affection, on the ground of the unsoundness of mind of grantor, that one has mental capacity sufficient to make a valid conveyance if at the time he is engaged in it he understands what he is doing, and understands the extent and value of his property, recollects the property he is disposing of, the persons who are the objects of his bounty, and the manner in which he is distributing his property among them, is not erroneous. *Thorne v. Cosand, 566.*

GRANT—See EASEMENTS.

Of right to mine coal, see MINES AND MINERALS, 1, 2; *Ingle v. Bottoms, 73.*

GRAVEL ROADS—Review of proceedings before board of commissioners, see CERTIORARI, *Gifford v. Board, etc., 654.*

HABEAS CORPUS—For possession of child, see PARENT AND CHILD, 1, 2; *Bullock v. Robertson, 521.*

HARMLESS ERROR—See APPEAL AND ERROR, 41-44.

HIGHWAYS—Establishing drain which is a benefit to, see **DRAINS**, 1; *Pleasant Tp. v. Cook*, 535.

Improvement.—*County Lines.*—*Statutes.*—*Repeal by Implication.*—The act of 1889 (Acts 1889, p. 433, §6792 *et seq.* Burns 1901) for the construction and improvement of county-line highways is not repealed by the act of 1899 (Acts 1899, p. 468, §6914 *et seq.* Burns 1901), though the subject-matter of the acts is the same and many of the provisions contain the same language.

Sefton v. Board, etc., 357.

HOUSEHOLDER'S EXEMPTION—See **EXEMPTIONS**.

HUSBAND AND WIFE—Will by married woman, see **WILLS**, 1, 2; *Hibberd v. Trask*, 498.

Promise to answer for debt of husband, see **FRAUDS, STATUTE OF**; *Indiana Trust Co. v. Finitizer*, 647.

1. *Principal and Surety.*—*Mortgages.*—*Tenants by Entireties.*—In a suit on a note executed by a husband and wife, secured by mortgage on real estate held by them as tenants by the entireties, there is no presumption that the consideration was not used for the benefit of the real estate so held by them, or that the wife is surety on said obligation, but the burden is upon her to allege and prove facts showing that she executed the note and mortgage as surety, and not as principal. *Guy v. Liberenz*, 524.

2. *Principal and Surety.*—*Bills and Notes.*—*Mortgages.*—*Consideration.*—A finding in a suit to foreclose a mortgage for \$1,000, executed by a husband and wife on real estate held by them as tenants by entireties, that the consideration for the note and mortgage sued upon was used to pay the individual indebtedness of the husband, and to enable him to perform a contract to erect a certain livery barn, and that no part of the consideration was received by the wife, nor expended in the betterment of her real estate, or real estate held by them as tenants by entireties, shows that the wife executed the mortgage as surety only, and that the same is invalid as to her; and the fact that the livery barn on which the proceeds of the loan were expended was taken by the husband and afterward conveyed to the wife and sold by her for \$800 in excess of all liens thereon, did not change the relation of the parties, it not being shown that she agreed, in consideration of the conveyance to her of the real estate upon which the barn was built, or for any other consideration, to pay the note and mortgage sued upon. *Guy v. Liberenz*, 524.

3. *Estoppel.*—*Mortgage Deduction Law.*—*Affidavit.*—A married woman will not be estopped from denying the validity of a mortgage on the ground of suretyship by the fact that she joined with her husband in an affidavit and obtained a reduction of taxes under the mortgage deduction law on the mortgaged real estate by reason of such mortgage. *Guy v. Liberenz*, 524.

4. *Principal and Surety.*—*Bills and Notes.*—Whether a married woman is principal or surety on a promissory note, or other obligation, is determined, not from the form of the contract, nor from the basis upon which the transaction was had, but from the inquiry as to whether she received in person or in benefit to her estate the consideration upon which the contract depends. *Guy v. Liberenz*, 524.

5. *Action by Married Woman.*—*Pleading.*—*Answer.*—In an action by a married woman on a note given to her by her husband and another, if there exists any reason on account of coverture or other-

HUSBAND AND WIFE—Continued.

wise why such person who had joined her husband in the execution of the note should not perform his agreement, such reason must be set up in an answer to be available as a defense. An answer of no consideration is insufficient to raise the issue.

Winklebleck v. Winklebleck, 570.

INCURRED RISK—Plaintiff not required to negative in complaint knowledge of danger, see **NEGLIGENCE**, 1; *Indiana, etc.*, *Oil Co. v. O'Brien*, 266.

INDETERMINATE SENTENCE LAW—Is constitutional, see **CONSTITUTIONAL LAW**, 7; *Shular v. State*, 300.

Failure to find age of defendant, see **CRIMINAL LAW**, 23; *Boone v. State*, 678.

INDIANAPOLIS CITY CHARTER—Authority to order elevation of railroad tracks, see **MUNICIPAL CORPORATIONS**, 14; *State ex rel., v. Indianapolis Union R. Co.*, 45.

INDICTMENT—Description of property stolen, see **CRIMINAL LAW**, 18; *Whitson v. State*, 610.

INJUNCTION—

1. *Private Person.—Public Right.*—A private person can not maintain an injunction for the invasion of a public right, where the complaint fails to show a special injury to the complainant.

Landes v. Walls, 216.

2. *Municipal Corporations.—Suit by Members of Common Council.*—Individual members of a city council can not maintain an injunction for the protection of public rights. *Landes v. Walls*, 216.

3. *To Prevent Lessor from Interfering with Operation of Mine.*—An injunction will lie to prevent the interference by the lessor with the construction of a railroad switch to a coal mine.

Ingle v. Bottoms, 73.

4. *Threatened Trespass.—Complaint.—Evidence.*—In a suit to enjoin a railroad company from entering upon and enclosing with a fence a strip of land, the complaint alleged that plaintiff and his grantors have been in open, notorious, and exclusive possession of the land for more than twenty years and that defendant is threatening to enclose same with a fence, and that said threatened occupation of the land is in derogation of the rights of plaintiff, and if not prevented, will work irreparable damage to him. No averments are made showing the nature of the damage, nor is it shown that the trespass will be continued so as to afford a foundation for a claim of title by adverse possession. The evidence showed that the land in controversy had formerly been covered by a gravel pit, and was of little value, and if an intention to fence it was shown, it was not disclosed that, under the circumstances, the fence would be of any special damage to plaintiff. Held, that a complete and adequate remedy at law existed in favor of plaintiff; that the complaint was not sufficient on demurrer, and that the court erred in awarding a perpetual injunction upon the evidence given in the case.

Wabash R. Co. v. Engleman, 329.

5. *Complaint.—Affidavits.*—Affidavits can only be considered as evidence of allegations made in a complaint for injunction, and can not be regarded as laying the foundation for equities not otherwise claimed.

Landes v. Walls, 216.

INSANE PERSONS—Mental capacity of donor, see **EVIDENCE**, 12;

Thorne v. Cosand, 566.

Execution of deed by person of unsound mind, see **DEEDS**, 1;

Thorne v. Cosand, 566.

INSANITY—As defense in prosecution for murder, see **CRIMINAL LAW**, 20, 21; *Coppenhaver v. State*, 540.

INSTRUCTIONS—See **TRIAL**.

Without the issue, see **APPEAL AND ERROR**, 48; *Germania Fire Ins. Co. v. Pücher*, 392.

As to self-defense in prosecution for assault and battery, see **CRIMINAL LAW**, 6; *Starr v. State*, 661.

As to different offenses in prosecution for assault and battery with intent to commit murder, see **CRIMINAL LAW**, 7, 8; *Starr v. State*, 661.

How made part of record, see **APPEAL AND ERROR**, 15-22.

INSURANCE—Performance of conditions of policy, see **PLEADING**, 2; *Security, etc., Assn. v. Lee*, 249.

1. *Proof of Loss.—Waiver.*—The refusal of an insurance company to pay a loss because the claim is excessive, may be a waiver of the furnishing of proofs of loss as much as where the refusal is put on any other grounds. *Germania Fire Ins. Co. v. Pücher*, 392.
2. *Proof of Loss.—Waiver.*—An adjuster who has been sent by an insurance company for the express purpose of adjusting a loss, has authority to waive a provision of the policy concerning proofs of loss. *Germania Fire Ins. Co. v. Pücher*, 392.
3. *Proof of Loss.—Waiver.—Evidence.*—An insurance company acting on an oral notice sent its adjuster to adjust a loss. He entered into negotiations of settlement with the agent of insured and there was but little difference between them over the items discussed. A few days later the company sent proofs of loss to its local agent but the agent of insured refused to execute the papers because he had not had a wall examined which was injured by the fire and which the board of works had ordered torn down. The adjuster thereafter returned and went before the board of works with a son of insured and attempted to have the enforcement of the order delayed, and refused to pay for damage to the wall, but said nothing about the omission to furnish proofs of loss. *Held*, that the evidence was sufficient to show a waiver of proofs of loss. *Germania Fire Ins. Co. v. Pücher*, 392.
4. *Proof of Loss.—Waiver.—Pleading.—Verdict.*—A complaint in an action on an insurance policy disclosed that proofs of loss were not made within sixty days as required by the policy, but alleged that when the fire occurred plaintiff gave notice thereof to defendant's agents who had issued the policy and defendant sent its adjuster to adjust the loss; that he entered into negotiations with plaintiff's agent concerning the loss, and continued the negotiations until after the time within which by the terms of the policy the assured was required to furnish formal proofs of loss; that they were unable to agree as to the amount of the loss and defendant refused and still refuses to pay the same, but did not base its refusal on the failure of plaintiff to furnish proofs of loss. *Held*, that if the complaint does allege facts from which a waiver can be declared as a matter of law, the plaintiff was entitled

INSURANCE—Continued.

thereunder to take the verdict of the jury upon the mixed question of law and fact as to whether there was a waiver of proofs of loss.
Germania Fire Ins. Co. v. Pücher, 392.

5. *Ownership of Property.*—A judgment for plaintiff in an action on an insurance policy will not be reversed because of the failure of the court to instruct the jury that it was necessary for plaintiff to prove that she was the owner of the property at the time of the fire, where the evidence showed without dispute that plaintiff was the owner at such time.

Germania Fire Ins. Co. v. Pücher, 392.

6. *Change of Beneficiaries.*—*Railroad Relief Association.*—The plan of organization of a railroad relief association provided for the payment of fixed death benefits "to the relatives or other beneficiaries specified in the applications of such employees." It also provided that, in certain circumstances, members might apply for insurance in a class wherein higher benefits were paid, the member so applying to sign a supplementary application, and that the applicant might in his application, or subsequently, designate a beneficiary other than relatives. Decedent, a single man, took a certificate in favor of his mother. After his marriage he went with his wife to the authorized agent of the association, and surrendered his old certificate and requested that a new certificate be issued to him, in a different class, in favor of his wife. A new certificate was issued and delivered to the wife, but it did not specify the name of the beneficiary. *Held*, that there was no new designation of beneficiary in accordance with the provision of the contract.

Mason v. Mason, 191.

7. *Change of Beneficiaries.*—*Railroad Relief Association.*—The provision of §5050 Burns 1901 relative to the right to change beneficiaries has no application to an unincorporated railroad relief association.

Mason v. Mason, 191.

INTEREST—Liability of trustee for interest on trust funds, see TRUSTS, 6; *Stanley's Estate v. Pence 636.*

INTERROGATORIES TO JURY—Failure of jury to answer, see TRIAL, 27; *Perry, etc., Stone Co. v. Wilson, 435.*

Seeking to ascertain on which paragraph of complaint verdict is based, see TRIAL, 18; *Clear Creek Stone Co. v. Dearmin, 162; Consolidated Stone Co. v. Morgan, 241.*

INTOXICATING LIQUORS—

1. *Remonstrance.*—*Trial.*—*Evidence.*—Where an application for the sale of intoxicating liquors was denied on account of a remonstrance thereto, as authorized by §7283i Burns 1901, the refusal of the court to permit the applicant to make proof of qualifications was harmless.
Shaffer v. Stern, 375.
2. *Remonstrance.*—*Power of Attorney.*—*Death of Remonstrant.*—*Effect.*—A power of attorney executed by a majority of the voters of a township authorizing the attorney to sign a remonstrance against the granting of a license to sell intoxicating liquors is not joint, but several as to each person who executed it, and the death of one or more persons executing it revoked the same as to them only.
Shaffer v. Stern, 375.
3. *Remonstrance.*—*Power of Attorney.*—A remonstrance against the granting of a license to sell intoxicating liquors signed by power of attorney is valid.
Shaffer v. Stern, 375.

INTOXICATING LIQUORS—Continued.

4. *Remonstrance.—Time of Filing.*—A remonstrance, under §7283i Burns 1901, against the granting of a license to sell intoxicating liquors, filed on Friday immediately preceding the Monday on which the regular session of the board of commissioners begins, is in time.
Shaffer v. Stern, 375.
5. *Remonstrance.—Towns.—Majority of Voters in Township.—Wards.*—A remonstrance against the granting of a license to sell intoxicating liquors in a town, signed by a majority of the legal voters of the township is sufficient, although it does not contain the signatures of a majority of the voters of the ward in which the applicant desires to sell.
Shaffer v. Stern, 375.

JUDGMENTS—Finding not within the issues, see **CONTRACTS**, 4;
Palmer Steel & Iron Co. v. Heat, Light & Power Co., 232.

Setting aside divorce decree after plaintiff's death, see **DIVORCE**, 3;
Day v. Nottingham, 408.

1. *Former Adjudication.*—In a suit to rescind a contract on the ground of fraud, the court found for the defendants, and that there was no fraud. *Held*, in a subsequent action for damages by the same plaintiff against the same defendants, and based upon the same alleged fraud, that a plea of former adjudication was good, although there had been a special finding on the former trial that plaintiff had opportunity to have ascertained the facts prior to the time of the alleged fraud.
Gutheil v. Goodrich, 92.
2. *Former Adjudication.—Fraudulent Sale of Corporate Stock.*—An action by the seller against the buyers of corporate stock for damages, charging fraud in procuring the sale, can not be maintained, where there has been a judgment against such seller in a previous suit by him against the buyers to rescind the sale.
Gutheil v. Goodrich, 92.
3. *Former Adjudication.—Pleading.*—Where a pleading states the same facts as were set out in a former pleading in an action between the same parties in interest, their representatives or privies, suing or being sued in the same quality or character, which facts were either admitted or traversed in the former action, and it appears that there was a final adjudication of the matters in issue by a court of competent jurisdiction, then the question of the truth or falsity of the matters in issue, as between the same parties, is considered as forever settled by the adjudication upon them.
Gutheil v. Goodrich, 92.
4. *Default.—Vacation for Fraud.—Collateral Attack.*—The impeachment of a judgment by a suit to set it aside and enjoin its collection for fraud is a direct, and not a collateral, attack.
Frankel v. Garrard, 209.
5. *Default.—Setting Aside for Fraud.—Injunction.*—The act of a plaintiff in causing a false return of summons to be made by an officer is sufficient cause for setting aside the judgment and enjoining its collection.
Frankel v. Garrard, 209.
6. *Vacation for Fraud.—Parties.*—In a suit to vacate a judgment and to enjoin its enforcement against real estate owned by the judgment debtor at the time the judgment was rendered, a subsequent grantee of the land was a proper party plaintiff.
Frankel v. Garrard, 209.

JUDGMENTS—Continued.

7. *Assignment.—Rights of Assignee.*—The assignee of a judgment takes it subject to all the defenses which could have been urged against it in the hands of the original judgment plaintiff.
Frankel v. Garrard, 209.
8. *Personal Injuries.—Municipal Corporations.—Independent Contractor.—Former Adjudication.*—Where one who received an injury by stepping into a dangerous excavation across a sidewalk, made by an independent contractor, brought suit against the contractor for the injuries sustained, which resulted in a judgment for the defendant, such judgment may be pleaded in bar of an action by such person against the city for such injuries.
City of Anderson v. Fleming, 597.
9. *Justice of Peace Judgment.—Setting Aside.—Jurisdiction.*—A suit to set aside a justice of the peace judgment, a transcript of which has been filed in the office of the county clerk, is properly brought in the circuit court, since a justice of the peace has no equity jurisdiction.
Frankel v. Garrard, 209.

JURISDICTION—As to appellate jurisdiction, see **APPEAL AND ERROR**, 1-4; *Smith v. American, etc., Co., 141*; *Consumers Paper Co. v. Eyer, 424*; *Taylor v. Patton, 4*.

JURY—Examination of juror, see **CRIMINAL LAW**, 16; *Coppenhaver v. State, 540*.

Selection of struck jury, see **APPEAL AND ERROR**, 39; *Mankin v. Pennsylvania Co., 447*.

Conversing with bailiff, see **TRIAL**, 1; *Shular v. State, 300*.

JUSTICES OF THE PEACE—Suit to set aside judgment rendered by, see **JUDGMENTS**, 9; *Frankel v. Garrard, 209*.

LANDLORD AND TENANT—See **MINES AND MINERALS**.

Lease.—Complaint.—Where property was leased for a period of ten years with the right on the part of the lessee to continue the same for an additional term of ten years on the same terms, with the exception that the rent for the second period of ten years should be \$150 a year instead of \$50 a year, a complaint to recover the first year's rent of the second period of ten years under the lease must show by direct averments, or by facts alleged, that defendant not only continued to hold possession of the leased premises, but that such possession was continued under the terms of the lease.
Crystal Ice Co. v. Morris, 651.

LARCENY—Description of property in indictment, see **CRIMINAL LAW**, 18; *Whitson v. State, 510*.

LEASE—See **LANDLORD AND TENANT**.

For mining purposes, see **MINES AND MINERALS**; *Ingle v. Bottoms, 73*.

Action for rent, see **LANDLORD AND TENANT**; *Crystal Ice Co. v. Morris, 651*.

LEVEE—Construction in connection with drain, see **DRAINS**, 4, 5; *Royse v. Evansville, etc., R. Co., 592*.

LIENS—See **MECHANIC'S LIEN**.

LIMITATION OF ACTIONS—Money received by husband from wife to be paid to her children at his death, see **TRUSTS**, 5; *Stanley's Estate v. Pence*, 636.

MALPRACTICE—See **PHYSICIANS**.

MANDAMUS—To compel county council to make appropriation to pay attorney's fees allowed by court, see **COUNTIES**, 4; *Board, etc.*, v. *Mowbray*, 10.

1. *Process.—Summons.—Alternative Writ.*—The mode of acquiring jurisdiction over the defendant in a proceeding for a writ of mandate is not by the service of an ordinary summons, but by service of an alternative writ of mandate as provided by §1184 Burns 1901. *Board, etc.*, v. *Mowbray*, 10.

2. *Demurrer to Alternative Writ.*—The question raised by a demurrer to the alternative writ is not whether the relator, under the facts, is entitled to some form of relief, but whether he is entitled to the specific relief prayed for.

State, ex rel., v. *Indianapolis Union R. Co.*, 45.

MARRIAGE—Revocation of will, see **WILLS**, 1, 2; *Hibberd v. Trask*, 498.

In action for death by wrongful act measure of damages not changed by marriage of decedent's widow, see **DAMAGES**; *Consolidated Stone Co. v. Morgan*, 241.

MASTER AND SERVANT—Weekly wage law is unconstitutional, see **CONSTITUTIONAL LAW**, 1; *Republic Iron & Steel Co. v. State*, 379.

1. *Wages.—Monthly Payment.—Penalty.—Attorney's Fees.—Complaint.*—In an action by an employe to recover the penalty and attorney's fees as provided by §§7056, 7057 Burns 1901, for failure of the employer to make full settlement with employe once a month, in the absence of a written contract to the contrary, it must be alleged and proved that there was no such written contract between the parties. *Toledo, etc.*, *R. Co. v. Long*, 564.

2. *Negligence.—Assumption of Risk.—Complaint.*—A complaint for personal injuries caused by the attachments to a bucket used in hoisting dirt from a mining shaft in which plaintiff was at work giving away is not insufficient for want of facts on the ground that the defect was obvious and open to plaintiff, where it was alleged that the place where plaintiff was at work was so dark that he could not see the attachments, that he did not know what constituted a proper attachment, and that it was not his business to investigate. *Brazil Block Coal Company v. Gibson*, 319.

3. *Assumption of Risk.—Safety of Appliances.—Relative Duties.*—Though a servant assumes all risks of which he knew, or of which, by the exercise of ordinary diligence, he could have known, and where the hazard is alike open to the observation of both, the master is not liable to the servant for injury resulting therefrom, yet the servant is not bound to search for defects, or make a critical inspection of the appliances that are provided for his use, but may rely upon the master's proper performance of his duty to furnish reasonably safe and proper appliances and properly to inspect the same, unless the defects are such as to be obvious to the servant while giving proper attention to the duties of his employment.

Brazil Block Coal Co. v. Gibson, 319.

MASTER AND SERVANT—Continued.

4. *Personal Injuries.—Knowledge of Danger.—Assumption of Risk.*—The mere fact that a brakeman knew that a certain switch target was improperly located too near the track, will not prevent a recovery for personal injuries sustained thereby, unless it is further shown that he knew and appreciated the dangers thereof, and that he had sufficient time and opportunity for making objections.
Wright v. Chicago, etc., R. Co., 583.
5. A recovery can not be had against a railroad company for the death of a brakeman caused by a low bridge which defendant negligently maintained, where it appeared that decedent had been many times warned, and knew from his own observation, of the dangerous condition of the bridge and voluntarily continued in the employment without any promise on the part of defendant to abate the danger.
Hollingsworth v. Chicago, etc., R. Co., 259.
6. *Defective Appliances.—Evidence.*—No error was committed in permitting a witness who worked in a mine in which plaintiff was injured to testify that he was unable to determine in the darkness whether a certain attachment to a bucket used in hoisting dirt, which gave way and injured plaintiff, was defective without making an actual examination thereof.
Brazil Block Coal Co. v. Gibson, 319.
7. *Liability for Negligence of Foreman.*—The master may delegate the duties of a foreman with no responsibility to his other servants further than to use due care not to retain an incompetent or negligent foreman.
Southern Ind. R. Co. v. Martin, 280.
8. *Negligence.—Fellow Servant.—Evidence.*—In an action against a railroad company for an injury to a servant caused by the alleged negligence of defendant's foreman, the evidence showed that plaintiff with twelve or fifteen other employes were stretching a wire cable on a train of flat cars, disentangling the same; that a loop of the cable was handed by one of the employes across the space between the cars to a man on the other car and in some manner the cable was allowed to drop and became caught in the car wheels or cross-ties and injured plaintiff. *Held*, to show that the cable was dropped by the intervening negligence of one or more of the men in passing it across the space between the cars, rather than that it fell because no one was standing at the intersection as alleged in the complaint.
Southern Ind. R. Co. v. Martin, 280.
9. *Personal Injuries.—Pleading.—Vice-Principal.*—A complaint alleged that plaintiff while in the employ of defendant and engaged in unloading and hauling stone on defendant's train was injured while assisting in stretching a wire cable used in unloading stone; that the work was done under the orders and direction of M., the manager of the train and work, who was also defendant's foreman and its vice-principal. *Held*, that the complaint when stripped of conclusions failed to show that M. was more than a mere fellow servant.
Southern Ind. R. Co. v. Martin, 280.
10. A complaint alleged that plaintiff was assisting in stretching a cable on a moving train with other employes and that he was injured by reason of the negligence of the foreman in giving the order to carry the cable over the space between the cars, without directing a servant to stand next to the space to keep the cable from falling. *Held*, that the complaint failed to show a causal connection between the negligence charged and the injury.
Southern Ind. R. Co. v. Martin, 280.
11. *Personal Injury.—Complaint.—Proximate Cause.*—In an action for the injury of a servant while working in a stone quarry by the

MASTER AND SERVANT—Continued.

fall of a wire rope which extended from the top of a derrick to the end of a boom-pole used for lifting stone and other heavy articles, it was alleged that the wire rope was old and unfit for use; that it had been spliced by a smaller rope, and was too short; that the clamp which fastened the rope to the iron drum was defective, and that by reason of the defects in the derrick and its tackle, while the derrick was being used to lower a box of coal the wire rope suddenly fell from the mast and injured plaintiff. *Held*, that the complaint sufficiently shows the negligence charged to be the proximate cause of plaintiff's injury.

Clear Creek Stone Co. v. Dearmin, 162.

12. *Negligence.—Imputed Knowledge of Master.*—A complaint for personal injuries to an employe while lighting the gas under a boiler caused by the alleged negligence of the president, to whose orders the employe was conforming when injured, alleged that the president turned on the gas from a large main knowing the valve connecting the same with the furnace he had ordered plaintiff to light was open. The jury found that the president was informed by another employe before he turned on the gas that the valve was closed, and that he believed it was closed when he turned the gas on. *Held*, that such finding was not necessarily inconsistent with the charge of knowledge in the complaint; since if the president turned on the gas without the degree of information that an ordinarily prudent man would have regarded as sufficient to warrant such action, the law imputed to him knowledge that the valve was open. *Consumers Paper Co. v. Eyer*, 424.
13. *Employers' Liability Act.—Railroads.—Locomotive Engineers.*—A cause of action exists under the fourth subdivision of the employers' liability act (§7083 Burns 1901) for the injury of a locomotive engineer caused by the negligence of another locomotive engineer in the common service. *Pittsburgh, etc., R. Co. v. Gipe*, 360.
14. *Employers' Liability Act.—Pleading.*—A case is not stated within the second subdivision of the employers' liability act (§7083 Burns 1901) where it is not shown that the injured employe was subject to the orders and directions of the person whose negligence caused the injury. *Southern Ind. R. Co. v. Martin*, 280.
15. *Employers' Liability Act.—Negligence of President.*—Where an employe was injured while complying with an order given him by the president of the corporation by the negligent act of the president in turning a gas valve, the corporation is not relieved from liability by reason of the fact that it was not a part of the duty of the president to operate the valve or to assist in the operation of the machinery in the plant. *Consumers Paper Co. v. Eyer*, 424.
16. In an action by an engineer for personal injuries, the evidence showed that the president of defendant corporation, in the absence of the superintendent, had ordered the engineer to light the gas in the furnaces, and while he was complying with such order the president negligently opened a large valve which caused an explosion, injuring plaintiff. *Held*, that the evidence authorized the finding that plaintiff was bound to conform to the orders of the president. *Consumers Paper Co. v. Eyer*, 424.
17. *Death by Wrongful Act.—Negligence.—Complaint.*—A complaint in an action for death by wrongful act caused by the fall of a derrick mast near which decedent was working, resulting from the failure of defendant properly to secure one of the guy-ropes, alleging that the condition of the guy-rope was known to the defendant, or could have been known to it by a reasonable inspection at any

MASTER AND SERVANT—Continued.

time within several months before the accident, and that decedent had no knowledge of the defective fastening or the dangers of the place, states a cause of action.

Consolidated Stone Co. v. Morgan, 241.

18. A complaint in an action for the death of a servant by wrongful act caused by the fall of a derrick alleging that defendant carelessly constructed the derrick by attaching a guy-rope to the side of a small stone, partly in the ground, in such manner that a heavy weight upon the boom-pole would pull the stone around and throw weight upon the other guy-ropes so as to break them, and that decedent had no knowledge of the defective fastening or the danger arising therefrom, states a cause of action.

Consolidated Stone Co. v. Morgan, 241.

19. *Death by Wrongful Act.—Defective Machinery.—Knowledge of Master.*—An instruction in the trial of an action for the wrongful death of a servant, caused by defective machinery, that if the master was shown to have constructed the defective machinery, no further proof of knowledge of its defective character was required, was not erroneous.

Consolidated Stone Co. v. Morgan, 241.

20. *Pleading.—Defective Averments Cured by Findings.*—Defective averments in a complaint as to knowledge on the part of defendant of the insecure fastenings of the guy-ropes of a derrick, in an action for death by wrongful act, are cured by the finding of the jury, in answer to interrogatories, that defendant had notice of the defective fastening of the guy-rope, and that the giving away of its anchorage was the cause of the fall of the derrick and the injury to decedent.

Consolidated Stone Co. v. Morgan, 241.

MAXIMS—

Volenti non fit injuria: An injury can not be done to a willing person; *Indiana, etc., Oil Co. v. O'Brien, 266, 269.*

Actio personalis moritur cum persona: A personal action dies with the person; *Day v. Nottingham, 408, 417.*

Qui facit per alium, facit per se: He who acts through another, does it himself; *Seifert v. State, 464, 467.*

Caveat emptor: Let the purchaser take heed; *Coulter v. Clark, 311, 317.*

Ita lex scripta est: The law is so written; *Seiler v. State, ex rel., 605, 610.*

MECHANIC'S LIEN—

1. *Notice.—Debtor in Failing Circumstances.*—The provision of the act of 1889 (Acts 1889, p. 257, §7255 Burns 1894) making certain claims against debtors in failing circumstances liens without filing notice refers to claims for wages for mechanics and laborers employed in and about any shop, mill, warehouse, store-room or manufactory; and such lien is limited in its operation to this specified class of service, and does not extend to structures other than those designated. *Goodhub v. Hornung's Estate, 127 Ind. 181, and Jenckes v. Jenckes, 145 Ind. 624, overruled.*

Sulzer-Vogt Mach. Co. v. Rushville Water Co., 202.

MECHANIC'S LIEN—Continued.

2. *Notice.—Last Material Furnished.*—Where the owner had accepted from a subcontractor certain fixtures and machinery placed in a power house as fully completed and had for more than four months been in the possession thereof, the contractor ceased to be the agent of the owner, in the absence of an objection by the latter that the contract had not been completed, to order additional materials that might be made the basis for an extension of the time in which to file a lien for the original work and materials furnished by the subcontractor.

Sulzer-Vogt Mach. Co. v. Rushville Water Co., 202.

MENTAL CAPACITY—To make deed, see GIFTS; *Thorne v. Cosand, 566.*

MINES AND MINERALS—See GAS AND OIL WELLS; LANDLORD AND TENANT.

Mining lease, see CONTRACTS, 1; *Ingle v. Bottoms, 73.*

1. *Rights of Lessee.*—A grant of the right to the coal under the surface of certain real estate carries with it as a necessary incident the right not only to penetrate the surface of the soil for coal, but also to use such means and processes for mining and removing the coal from the premises as may be reasonably necessary.
Ingle v. Bottoms, 73.

2. *Lease.—Right to Construct Railroad Switch to Mine.*—A mining lease granting to the lessee the right to enter upon the lands described for the purpose of mining coal, and of conducting and operating to any extent he may deem advisable, but not to hold possession of the land "for any other purpose, except one acre, more or less, for operating the mines, and for dwellings," gives by implication the right to construct a railroad switch for the purpose of transporting the coal, and otherwise operating the mine.
Ingle v. Bottoms, 73.

MINIMUM WAGE LAW—Is unconstitutional, see CONSTITUTIONAL LAW, 8; *Street v. Varney Electrical Sup. Co., 328.*

MISCONDUCT OF COUNSEL—See ATTORNEY.

When harmless error, see APPEAL AND ERROR, 44; *Consumers Paper Co. v. Eyer, 424.*

MISTAKE—In the recording of a mortgage, see MORTGAGES, 2; *Osborn v. Hall, 153.*

MORTGAGE DEDUCTION LAW—Execution of affidavit will not estop wife from denying validity of mortgage on the ground of suretyship, see HUSBAND AND WIFE, 3; *Guy v. Liberenz, 524.*

MORTGAGES—On lands held by entireties, see HUSBAND AND WIFE, 1, 2; *Guy v. Liberenz, 524.*

1. *Failure to Record.—Good as Against General Creditors.—Fraud.*—In the absence of express fraud, the failure of a mortgagee to record a mortgage within the time fixed by the statute will not, as against the general creditors of the mortgagor, either prior or subsequent, render it invalid.
State Bank v. Backus, 682.
2. *Record.—Mistake.—Lien.*—Where real estate is sold subject to a mortgage as shown by the record, and the purchaser is without

MORTGAGES—Continued.

knowledge that there was a mistake in the record, the mortgage is a lien on the land for no greater amount than that named in the record.
Osborn v. Hall, 163.

3. *Foreclosure.—Decree.—Inchoate Interest of Wife.*—A foreclosure decree directing the sale of the undivided two-thirds of the realty in the first instance and reserving the remainder for defendant's wife as and for her inchoate interest in the real estate was proper.
State Bank v. Backus, 682.
4. In a suit to foreclose a mortgage in which defendant's wife was joined as an encumbrancer, a provision in the decree that in case the property was purchased by the wife she should have the right to credit her mortgage indebtedness on the purchase price after paying in a sum sufficient to discharge in full the prior liens was not improper.
State Bank v. Backus, 682.
5. *Failure of Mortgagee to Satisfy.—Penalty.—Attorney's Fees.*—By reason of an error in the recording of a mortgage, a note secured thereby for \$1,880 was erroneously described as calling for \$1,308. A purchaser of the real estate, relying upon the record, assumed the payment of the mortgage as a part of the consideration. When the note became due, the purchaser of the real estate paid \$1,308, and upon the refusal of the mortgagee to release the mortgage, brought suit to compel an entry of satisfaction, and to recover penalty and attorney's fees provided for by §1106 Burns 1894. *Held*, that the purchaser was entitled to a release of the mortgage, but could not recover penalty and attorney's fees; since, under the statute, they were recoverable only upon the payment "of the debt or obligation" which "the mortgage was made to secure."
Osborn v. Hocker, 1.

MOTIONS—For supplemental finding, see **APPEAL AND ERROR**, 23;
Muncie Nat. Gas Co. v. City of Muncie, 97.

MUNICIPAL CORPORATIONS—Suit by members of common council for injunction to protect public rights, see **INJUNCTION**, 2; *Landes v. Walls, 216.*

1. *Ordinances.—Passage.—Parliamentary Law.*—In a proceeding to remove members of a city council appointed under an ordinance increasing the number of city wards, on the ground that the ordinance was passed on first reading without a suspension of the rules, an allegation in the complaint, that §18, article 4, of the state Constitution, which requires that every bill shall be read by sections on three several days, unless the three several readings are dispensed with by a two-thirds vote "is a general rule of parliamentary law," will be regarded as a conclusion of the pleader, in the absence of an averment that the council had adopted it as one of its governing rules.
Landes v. State, ex rel., 479.
2. *Ordinances.—Passage.—Parliamentary Law.*—Where the rules of order of the common council of a city provided that the general rules of parliamentary law, so far as the same were applicable, should be considered the rules of the common council, the common council had the right to determine what rules were general and their applicability to the business before them, and the court can not say as a matter of law that it was incumbent upon the council to read a certain ordinance on three several days before its final passage or that a single reading was insufficient.
Landes v. State, ex rel., 479.
3. *Ordinances.*—The act of 1899 (Acts 1899, p. 125) does not affect the powers of common councils to pass ordinances, nor the du-

MUNICIPAL CORPORATIONS—Continued.

- ties directed of city officers with respect to the enrolling, attesting, and signing of the same, except to invest the mayor with the right of veto. *Landes v. State, ex rel., 479.*
4. The provisions of the act of 1899 (Acts 1899, p. 125) as to the enrollment, attestation, and approval by the mayor of a city ordinance are merely directory, and the appointment of officers under an ordinance is not invalid because the appointment was made before the ordinance was enrolled, attested, and signed by the clerk as directed by said act. *Landes v. State, ex rel., 479.*
 5. *Redistricting.—Ordinance.—Publication.*—Section 3471 Burns 1901 does not require the publication of notice prior to the adoption of an ordinance redistricting a city into wards, and the operation of the ordinance is not postponed until after the time fixed for publication has expired. *Landes v. Walls, 216.*
 6. *Creation of New Wards.—Appointment of Councilmen.*—The common council of a city is authorized to appoint councilmen for newly created city wards under §3484 Burns 1901, which provides that all vacancies in the office of mayor, clerk, or councilmen in any incorporated city occurring in any manner shall be filled by the common council. *Landes v. Walls, 216.*
 7. *Officers.—Removal of City Attorney.—Discontinuance of Office.*—The act of 1893 (Acts 1893, p. 50) provided that certain officers, including city attorneys appointed by the common council of cities of a certain class, should be subject to removal by said council at its pleasure. The act of 1899 (Acts 1899, p. 562) provided that city attorneys in cities of such class should not be removed from office for the term for which they were elected, except for cause, and contained a section repealing all laws and parts of laws in conflict therewith. *Held*, that while the latter act repealed so much of the former act as authorized the removal of city attorneys, it did not take away the power of common councils to abolish or discontinue the office of city attorney. *Downey v. State, ex rel., 578.*
 8. *Removal of City Attorney.—Motives of Council.*—The action of the common council in abolishing the office of city attorney is the exercise of a legislative power, and the courts can not inquire into the motives of the council in the exercise of such power. *Downey v. State, ex rel., 578.*
 9. *Removal of City Attorney.*—Where the common council of a city abolished the office of city attorney, the incumbent was no longer an officer, and when the council again created the office he did not become city attorney by virtue of the unexpired term of office for which he was elected. *Downey v. State, ex rel., 578.*
 10. *Damages.—Independent Contractor.*—A city is liable equally with the contractor to a person who was injured by stepping into an excavation across a sidewalk made by an independent contractor, where such excavation was authorized by the contract and was of such a character as to render the sidewalk dangerous for public travel. *City of Anderson v. Fleming, 597.*
 11. *Records of Common Council as Evidence.*—The record of the common council of a city showing the rejection of a schedule of gas rates submitted by a gas company is proper evidence of the fact of such rejection, where a certified copy of the resolution was served upon the company. *Muncie Nat. Gas Co. v. City of Muncie, 97.*
 12. *Power of City.*—Municipal corporations can do no act for which authority is not expressly granted or may not be reasonably inferred or implied. *State, ex rel., v. Indianapolis Union R. Co., 45.*

MUNICIPAL CORPORATIONS—Continued.

13. *Nuisance.—Power of City to Define.*—The general authority granted by a city charter to declare what shall constitute a nuisance does not empower it to declare anything to be a nuisance *per se* which in fact was not recognized as such by the common law.
State, ex rel., v. Indianapolis Union R. Co., 45.
14. *City of Indianapolis has no Power to Require Elevation of Railroad Tracks.*—Under the provisions of §23 of the Indianapolis city charter (§3794 Burns 1901), by which the city of Indianapolis is empowered to declare by ordinance what shall constitute a nuisance, to prevent the same, require its abatement, and to require railroad companies to change the grade and crossings of their respective roads, and to raise and lower their tracks to conform to any grade which may be established, the city has no power to enact an ordinance requiring all railroad companies operating within the city limits to elevate their tracks over all streets within a certain described district.
State, ex rel., v. Indianapolis Union R. Co., 45.
15. *Fixing Price of Natural Gas.—Ultra Vires.*—Where a natural gas company continues to use the streets of a city to distribute natural gas to private consumers by virtue of an accepted ordinance fixing the price of gas to consumers, it can not question the right of the city to enter into such contract.
Muncie Nat. Gas Co. v. City of Muncie, 97.
16. *Natural Gas.—Price to Consumers.—Injunction.*—A city may enjoin a natural gas company from operating under a franchise, granted by such city to furnish gas to the citizens thereof, in violation of a provision of the franchise fixing the price of gas to consumers.
Muncie Nat. Gas Co. v. City of Muncie, 97.
17. *Water-Works.—Electric Light Plant.—Property for Public Use.*—Water-works and an electric light plant constructed or purchased by the city and maintained by it for the extinguishment of fires, for domestic purposes, for lighting streets, and for use in the houses of the inhabitants of the city, are to be regarded as property devoted to public use.
Lake County Water & Light Co. v. Walsh, 32.
18. *Property Held for Public Use.—Sale by City.*—Property held and used by a city for public purposes is held in trust for the inhabitants, and can not be sold or disposed of unless the city is specially authorized by the legislature to make such sale or disposition and thereby determine the trust.
Lake County Water & Light Co. v. Walsh, 32.
19. *Street Improvements.—Acceptance of Bid.—Breach of Contract.—Complaint.*—No error was committed in sustaining a demurrer to a complaint against a city for an alleged breach of contract in refusing to permit plaintiff to improve a street after accepting his bid, where it was not disclosed by the complaint whether jurisdiction had attached to make the improvement.
McKee v. City of Greensburg, 378.
20. *Street Improvements.—Failure to Make Assessments.*—A lien for street improvements made pursuant to the act of 1889 (Acts 1889, p. 237) can not be enforced, where the common council of a city has failed to make the assessment as provided for by §7 of said act.
Laakmann v. Pritchard, 24.
21. *Street Improvement.—Validity of Ordinance.*—A statute providing that the common council of a city may order a street to be "graded and paved," gives no authority to such council to enact an ordinance for the grading of a street without paving.
Taylor v. Patton, 4.

MUNICIPAL CORPORATIONS—Continued.

22. *Assessments for Street Improvements.—Collection.—Estoppel.*—An abutting landowner who has full knowledge that persons are in good faith acting upon the assumption that the proceedings in which a special assessment for a street improvement may be made are valid, and stands by without objection till large sums of money are expended upon it, is estopped to deny the authority by which the improvement is made; but, in an action to enforce the collection of the assessment for such improvement, the facts constituting the estoppel must be fully and distinctly pleaded. *Taylor v. Patton, 4.*

MURDER—See **CRIMINAL LAW**.

NATURAL GAS—See **GAS AND OIL WELLS**.

NEGLIGENCE—See **CARRIERS; DAMAGES; MASTER AND SERVANT; RAILROADS; STREET RAILROADS**.

Of president of corporation, see **MASTER AND SERVANT, 15; Consumers Paper Co. v. Eyer, 424.**

Injury to passenger while attempting to alight from car, see **STREET RAILROADS; Indianapolis St. R. Co. v. Whitaker, 125.**

Action for injury to passenger, see **CARRIERS; Baltimore, etc., R. Co. v. Harbin, 441.**

Allegation in complaint for death of brakeman as to signals known as "telltale," see **RAILROADS, 2; Hollingsworth v. Chicago, etc., R. Co., 259.**

Remedying defective appliance after injury, see **EVIDENCE, 2; Brazil Block Coal Co. v. Gibson, 319.**

1. *Incurred Risk.—Notice.—Pleading.*—Under §859a Burns 1901, which provides that in actions for personal injuries it shall not be necessary for plaintiff to allege or prove freedom from contributory negligence, plaintiff, in an action for personal injuries caused by the giving way of a defective bridge which she was attempting to cross, is not required to negative in the complaint previous notice or knowledge of the unsafe condition of the bridge.

Indiana, etc., Oil Co. v. O'Brien, 266.

2. *Pleading.—Evidence.*—In an action for personal injuries caused by the giving way of a defective bridge, the defendant may, under the general denial, prove that plaintiff had notice of the unsafe condition of the bridge prior to the accident, although notice thereof was not negated in the complaint.

Indiana, etc., Oil Co. v. O'Brien, 266.

3. *Alighting from Street Car.*—Where an aged and crippled passenger was thrown down by the premature starting of a street car from which he was attempting to alight, and in the fall caught hold of the car and was dragged and thereby injured, his act in holding to the car did not, under the circumstances, constitute contributory negligence. *Indiana R. Co. v. Maurer, 25.*

NEGOTIABLE INSTRUMENTS—See **ALTERATION OF INSTRUMENTS; BILLS AND NOTES**.

NEW TRIAL—For defective verdict, see **TRIAL, 29, 30; Maxwell v. Wright, 515.**

NOTES—See **BILLS AND NOTES**.

NOTICE—By publication, see **DIVORCE**, 1-3; *Day v. Nottingham*, 408.

NUISANCE—Authority of city to declare what is nuisance *per se*, see **MUNICIPAL CORPORATIONS**, 13; *State, ex rel., v. Indianapolis Union R. Co.*, 45.

OFFICERS—Appointment of city councilmen, see **MUNICIPAL CORPORATIONS**, 6; *Landes v. Walls*, 216.

Removal of city attorney, see **MUNICIPAL CORPORATIONS**, 7-9; *Downey v. State, ex rel.*, 578.

Power of common council of a city to discontinue the office of city attorney, see **MUNICIPAL CORPORATIONS**, 7; *Downey v. State, ex rel.*, 578.

Action on bond for extortion, see **EXTORTION**; *State, ex rel., v. Bagby*, 669.

Action by taxpayer to recover unlawful allowance to county auditor, see **COUNTIES**, 1; *Zuelly v. Casper*, 455.

De facto officers, see **EQUITY**, 4; *Landes v. Walls*, 216.

Courts of equity will not determine title to office, see **EQUITY**, 3; *Landes v. Walls*, 216.

1. *Quo Warranto*.—The relator in a *quo warranto* proceeding to remove an incumbent of an office and obtain possession of the office himself, must recover upon the strength of his own right or title thereto and not upon the weakness or infirmities of the respondent's right or title. *State, ex rel., v. Wheatley*, 183.
2. *Quo Warranto*.—An information in the nature of a *quo warranto* seeking the removal of an incumbent of a county office and the possession of the office by relator which fails to show that relator has taken the oath of office and given bond as required by law is fatally defective. *State, ex rel., v. Wheatley*, 183.

ORDINANCES—See **MUNICIPAL CORPORATIONS**.

Validity on appeal, see **APPEAL AND ERROR**, 4; *Taylor v. Patton*, 4.

OVERRULED CASES—*Goodbub v. Horning's Estate*, 127 Ind. 181; *Jenckes v. Jenckes*, 145 Ind. 624, see **MECHANIC'S LIEN**, 1; *Sulzer-Vogt Mach. Co. v. Rushville Water Co.*, 202.

PARENT AND CHILD—

1. *Custody*.—*Habeas Corpus*.—In a suit for the custody of a child, whether between the father and mother, or either of them, and third persons, the welfare of the child is paramount to the claim of either parent, and the order of court should be made with regard to the best interests of the child. *Bullock v. Robertson*, 521.
2. *Custody*.—*Habeas Corpus*.—*Appeal and Error*.—Where the custody of an infant in a *habeas corpus* proceeding is awarded by the court upon the evidence, such judgment will not be reversed upon rulings which merely go to the sufficiency of the return. *Bullock v. Robertson*, 521.

PARLIAMENTARY LAW—Governing city council, see **MUNICIPAL CORPORATIONS**, 1, 2; *Landes v. State, ex rel.*, 479.

PARTIES—Misjoinder of parties is not a ground for demurrer, see PLEADING, 11; *Frankel v. Garrard*, 209.

Plea in abatement for nonjoinder of parties defendant, see PLEADING, 8; *Boseker v. Chamberlain*, 114.

Demurrer for defect of parties, see PLEADING, 10, 11, 12, 13; *Frankel v. Garrard*, 209; *Boseker v. Chamberlain*, 114.

When complaint is not good as to both parties who join in it, see PLEADING, 9; *Frankel v. Garrard*, 209.

Amendment of complaint by joining another party plaintiff, see PLEADING, 5; *Frankel v. Garrard*, 209.

Private person can not maintain an injunction for the invasion of a public right, see INJUNCTION, 1; *Landes v. Walls*, 216.

State is not a proper party in action to recover unlawful allowance made county auditor, see PLEADING, 7; *State, ex rel., v. Casper*, 490.

Suit by taxpayer to recover unlawful allowance made county auditor, see COUNTIES, 1; *Zuelly v. Casper*, 455.

In suit to rescind contract, see FRAUD, 2; *Gulheil v. Goodrich*, 92.

On appeal, see APPEAL AND ERROR, 6-8; *Kuhn v. American Mut. Life Ins. Co.*, 356; *Haymaker v. Schneck*, 443.

Physical examination of party in presence of jury, see EVIDENCE, 8; *Aspy v. Botkins*, 170.

Defect of.—Waiver.—The failure to raise the question of nonjoinder of parties by demurrer in proper form, or by plea in abatement, is a waiver of such objection. *Boseker v. Chamberlain*, 114.

PARTITION—By widow of vendee, see VENDOR AND PURCHASER; *Schaefer v. Purviance*, 63.

PAYMENT—

Fraud.—Ratification.—Where plaintiff executed his note for certain stock in a company, and paid same before discovering the fraud practiced upon him in inducing him to purchase the stock, such payment will not operate as a ratification of the transaction. *Coulter v. Clark*, 311.

PENALTIES—Penalty for failure to satisfy mortgage, see MORTGAGES, 5; *Osborn v. Hocker*, 1.

Recovery of for violation of monthly payment wage law, see MASTER AND SERVANT, 1; *Toledo, etc., R. Co. v. Long*, 564.

PHYSICAL EXAMINATION—Of party in presence of jury, see EVIDENCE, 8; *Aspy v. Botkins*, 170.

PHYSICIANS—Privileged communications, see WITNESSES, 2, 3; *Aspy v. Botkins*, 170.

1. *Malpractice.—Instruction.—License.*—In an action against a surgeon for malpractice, an instruction as to the degree of skill required of a physician is not erroneous for failure to state that the physician must have a license to practice. *Aspy v. Botkins*, 170.

PHYSICIANS—Continued.

2. *Malpractice.—Complaint.—Contributory Negligence.*—The nature of an action for the negligence of a surgeon in treating an injury is such as to bring it within the provisions of the act of February 17, 1899 (Acts 1899, p. 58), and it is, therefore, not necessary for the plaintiff to allege and prove want of contributory negligence.
Aspy v. Botkins, 170.

PLEADING—Coverture, see **HUSBAND AND WIFE, 5**; *Winklebleck v. Winklebleck, 570.*

Defective complaint cured by findings, see **MASTER AND SERVANT, 20**; *Consolidated Stone Co. v. Morgan, 241.*

Plaintiff in action for personal injuries is not required to negative knowledge of danger, see **NEGLIGENCE, 1**; *Indiana, etc., Oil Co. v. O'Brien, 266.*

1. *Complaint.—Caption.—Trustee.*—The suffix, "trustee," to the name of the plaintiff in the caption of a complaint will be treated merely as *descriptio personae*, where it does not appear from averments of the complaint that the plaintiff is the trustee of an express or other trust, or that the action is prosecuted for the benefit of a third person.
Marion Bond Co. v. Mexican Coffee & Rubber Co., 558.
2. *Condition Precedent.*—An allegation in a complaint in an action on an insurance policy "that plaintiff fully performed all the obligations required of her" is a substantial compliance with the provision of §878 Burns 1901, that "in pleading the performance of a condition precedent in a contract, it shall be sufficient to allege, generally, that the party performed all the conditions on his part."
Security, etc., Assn. v. Lee, 249.
3. *Complaint.—Proof.—Variance.*—A recovery may be had, where there is evidence sufficient to establish substantially the issuable facts constituting the cause of action set out in the complaint, although all allegations of the complaint may not be proved.
Stanley's Estate v. Pence, 636.
4. *Complaint.—Proof.—Variance.—Claim Against Decedent's Estate.*—The rule that a plaintiff must recover upon the theory outlined by the facts alleged in his complaint does not apply to nor control in the prosecution of a claim against a decedent's estate; since the statute does not require a formal complaint, but a mere statement of the claim.
Stanley's Estate v. Pence, 636.
5. *Amendment of Complaint.—New Parties Plaintiff.*—The amendment of a complaint, by joining another party plaintiff, is proper at any time before answer without leave, and the trial court may in its discretion permit such amendment at any time.
Frankel v. Garrard, 209.
6. *Amendment to Conform to Proof.—Presumption.*—Where the variance between the allegations of the complaint and the proof is not a matter of substance, the complaint, by reason of the requirement of §670 Burns 1901, must be deemed to have been so amended as to make the allegations conform to the proof.
Consumers Paper Co. v. Eyer, 424.
7. *Action Against County Auditor to Recover County's Money.—State as Party.*—In an action against a county auditor to recover money belonging to the county, the State is not a proper party plaintiff, and the error in making the State such a party is not cured by the joinder of taxpayers as relators.
State, ex rel., v. Casper, 490.

PLEADING—Continued.

8. *Abatement.—Parties.*—A plea in abatement for nonjoinder of parties defendant which fails to show that the persons not joined as defendants are living and subject to process of the court, thus giving a better writ, is bad. *Boseker v. Chamberlain, 114.*
9. *Complaint Not Good as to One Party Joined.*—A complaint which is not good as to either of two plaintiffs who join in it, is bad as to both. *Frankel v. Garrard, 209.*
10. *Demurrer.—Defect of Parties.*—Defect of parties, as a statutory cause for demurrer, means too few, not too many parties. *Frankel v. Garrard, 209.*
11. *Demurrer.—Parties.—Misjoinder.*—Misjoinder of parties is not a ground of demurrer. *Frankel v. Garrard, 209.*
12. *Complaint.—Demurrer for Defect of Parties.*—A demurrer for want of facts presents no question as to defect of parties. A demurrer for defect of parties must specifically point out the defect complained of, and give the name or names of the parties who should be joined. *Boseker v. Chamberlain, 114.*
13. *Complaint by Assignee.—Defect of Parties.—Demurrer.*—If the facts alleged in a complaint by the assignee of a claim arising out of a contract show that the assignor is dead, and that there is no personal representative within the State, the complaint is sufficient to withstand a demurrer for defect of parties. *Boseker v. Chamberlain, 114.*
14. *Demurrer.*—A demurrer to a complaint for want of sufficient facts calls into question not only the sufficiency of the facts to constitute a cause of action, but the right of plaintiffs to sue jointly. *Frankel v. Garrard, 209.*
15. *Separate Demurrer.*—A separate demurrer of a codefendant tests the sufficiency of a complaint as to him, although the demurrer was general in form, and did not contain the limiting words "as to him." *Frankel v. Garrard, 209.*
16. *Estoppel.*—No question of estoppel is presented on appeal from a judgment for defendant on an answer of set-off in an action for breach of contract, where the estoppel was not pleaded by plaintiff as a defense thereto. *Adams v. Adams, 61.*
17. *Demand.—Appeal and Error.*—An averment in answer to an action against the receiver of a building and loan association that petitioner as secretary of the association collected and received a large sum of money belonging to the association which he failed and refused to account for, or to pay over to the association or the receiver, implies a demand, and is sufficiently certain when attacked for the first time in the Supreme Court. *Whitcomb v. Stringer, 82.*
18. *Answer.*—Where the complaint is insufficient, it is immaterial whether the answer is good or bad, since there is no office for an answer to perform until the plaintiff has stated a cause of action against the defendant. *Alexander v. Spaulding, 176.*
19. *General Denial.—Defenses.—Statute of Frauds.*—A defendant in an action on a contract may, under the general denial, show that the contract between the parties was a different one from that set forth in the complaint, or that the agreement was void and that no contract at all was made. *Indiana Trust Co. v. Finitzer, 647.*
20. *Failure to Reply.—Judgment on Pleadings.*—Where a reply of confession and avoidance is filed to a good special answer, and a demurrer to such reply is sustained, the failure to reply further entitles the defendant to a judgment on the pleadings. *Hibberd v. Trask, 498.*

POLICE POWER—Act regulating the sinking and casing of gas-wells, see CONSTITUTIONAL LAW, 6; *Given v. State*, 552.

POWER OF ATTORNEY—To remonstrate against granting license to sell intoxicating liquors, see INTOXICATING LIQUORS, 3; *Shaffer v. Stern*, 375.

Effect of death of one of several persons executing power of attorney, see INTOXICATING LIQUORS, 2; *Shaffer v. Stern*, 375.

PRACTICE—See TRIAL.

PRINCIPAL AND SURETY—How question of suretyship determined, see HUSBAND AND WIFE, 4; *Guy v. Libereuz*, 524.

Burden upon wife in action on note to show that she executed note as surety, see HUSBAND AND WIFE, 1; *Guy v. Libereuz*, 524.

Proceeds of note to be used for special purpose, see BILLS AND NOTES; *Baut v. Donly*, 670.

PRIVILEGED COMMUNICATIONS—Of physician and patient, see EVIDENCE, 6, 7, and WITNESSES, 2, 3; *Seifert v. State*, 464; *Aspy v. Botkins*, 170.

PROCESS—See PUBLICATION.

In mandamus proceeding, see MANDAMUS, 1; *Board, etc., v. Mowbray*, 10.

PROMISSORY NOTES—See BILLS AND NOTES.

PROXIMATE CAUSE—Of injury to employe in stone quarry, see MASTER AND SERVANT, 11; *Clear Creek Stone Co. v. Dearmin*, 162.

PUBLICATION—Notice by, see DIVORCE, 1; *Day v. Nottingham*, 408.

QUERY—

Receivers.—*Change from Judge.*—Is an intervening petitioner in a receivership entitled to a change from the judge?
Whitcomb v. Stringer, 82.

QUO WARRANTO—See OFFICERS.

RAILROAD RELIEF ASSOCIATION—Change of beneficiaries, see INSURANCE, 6, 7; *Mason v. Mason*, 191.

Payment of claim pleaded as bar to suit against railroad, see COMPROMISE AND SETTLEMENT, 2; *Pittsburgh, etc., R. Co. v. Gipe*, 360.

RAILROADS—See STREET RAILROADS.

Right of mining company to construct railroad switch to mine, see MINES AND MINERALS, 2; *Ingle v. Bottoms*, 73.

As to elevation of tracks within city of Indianapolis, see MUNICIPAL CORPORATIONS, 14; *State, ex rel. v. Indianapolis Union R. Co.* 45.

1. *Crossings.*—*Contributory Negligence.*—The rule requiring a traveler approaching a railroad crossing to look and listen can not be treated as an arbitrary standard of care, to be inflexibly applied

RAILROADS—Continued.

by the courts in all cases, and the ruling of the court in rendering judgment for the defendant on answers to interrogatories, notwithstanding the general verdict, in an action against a railroad company for the death of plaintiff's decedent, on the ground that the interrogatories failed to show that decedent who was crossing a side-track on which detached freight-cars were standing, in order to board defendant's passenger-train, did not look in the direction of an engine standing on the side-track which moved the dead cars and killed decedent, was erroneous.

Stoy v. Louisville, etc., R. Co., 144.

2. *Injury to Brakeman.—Complaint.*—An averment in a complaint against a railroad company for the death of a brakeman, caused by a low bridge, that defendant had permitted its signals known as "telltales," to warn brakemen of the proximity of the bridge, to become worn and out of repair, is mere surplusage, it not being charged that deceased had any knowledge of telltales, or that he knew what they were intended for, or that they were in common use on railroads as a means of warning.

Hollingsworth v. Chicago, etc., R. Co., 259.

3. *Enforcement of Judgment.—Summoning Agent to Answer as to Funds in His Hands.*—A suit for the enforcement of a judgment against a railroad company under §834a Burns 1901 is in the nature of a proceeding in garnishment, and where no writ was issued against the agent, and he had not answered as to funds in his hands, or as to the amount that would probably come into his hands, there was no *res* on which to base a judgment ordering such agent to pay into court a certain amount monthly, until the judgment should be paid, out of the funds coming into his hands as such agent.

Chicago, etc., R. Co. v. Witt, 680.

RECEIVERS—

1. *Appointment.*—While the appointment of a receiver is a judicial act, it is not improper for the judge making the appointment to seek the counsel and opinion of those interested in the trust as to the fitness of the person to be appointed. *Polk v. Johnson, 292.*
2. *Appointment.—Agreement as to Compensation.—Public Policy.*—A receiver, prior to his appointment, sought the insolvent and importuned him to assist him in procuring the appointment as receiver, and, to induce such assistance, promised and agreed, if appointed, to discharge the duties thereof with diligence and fidelity, and without any charge or compensation. *Held*, that the agreement was not invalid for public impolicy as an unwarranted interference with the freedom of judicial action.

Polk v. Johnson, 292.

3. *Appointment.—Agreement as to Compensation.—Consideration.—Gratuitous Service.*—An agreement entered into between an insolvent debtor and a creditor that if the debtor would consent to the appointment of the creditor as receiver he would serve without compensation is not invalid for want of a sufficient consideration.

Polk v. Johnson, 292.

4. *Pleading.—Amendment.—Change of Venue.*—Where the court at the conclusion of the evidence of petitioner, in an action in a receivership case, permitted the receiver to file an answer of set-off, it was not error to deny a jury trial and a change of venue from the judge, the trial having been in progress for more than thirty days and there being no new issue introduced by the additional answer.

Whitcomb v. Stringer, 82.

RECEIVERS—Continued.

5. *Intervening Petition.*—*Trial.*—*Pleading.*—*Amendment.*—No error was committed by the court in the trial of an action on an intervening petition in a receivership in directing the receiver at the conclusion of the evidence, under the answer of general denial, to file an additional answer of set-off. *Whitcomb v. Stringer, 82.*
6. *Intervening Petition.*—*Answer of Set-off.*—*Dismissal of Petition.*—A trial on an intervening petition against the receiver of a building and loan association progressed to the conclusion of the evidence under an issue and agreement that permitted the giving in evidence by the receiver, as a defense, of all proper matters of set-off, but would not support a judgment over against petitioner, when the court, on its own motion, arrested the progress of the trial, and ordered the receiver to file an additional pleading in set-off, and granted an adjournment for that purpose. After adjournment, petitioner's attorney gave notice to the judge and attorneys for the receiver that he desired to file a written dismissal of his intervening petition, and, with the approval of the attorneys, agreed to meet in the court room in the afternoon of the same day and take the matter up. Upon the convening of court the receiver's attorney filed the set-off, as directed, asking affirmative relief, and the petitioner's attorney filed his motion to dismiss, which was sustained. *Held*, that the court did not err in refusing to permit petitioner to dismiss before permitting the receiver to file the answer. *Whitcomb v. Stringer, 82.*

RECORDS—Of common council as evidence, see **MUNICIPAL CORPORATIONS**, 11; *Muncie Nat. Gas Co. v. City of Muncie, 97.*

On appeal, see **APPEAL AND ERROR**.

REFORMATION OF INSTRUMENTS—Reformation of contract, see **EQUITY**, 2; *Palmer Steel & Iron Co. v. Heat, Light & Power Co., 232.*

REMITTITUR—Of part of judgment, see **TRIAL**, 81; *Whitcomb v. Stringer, 82.*

REMONSTRANCE—Against granting license to sell intoxicating liquors, see **INTOXICATING LIQUORS**, 1-5; *Shaffer v. Stern, 375.*

REMOVAL OF CAUSES—

1. *Application.*—The filing and presenting of a proper application and bond for the removal of a cause to the federal court, by one entitled to the removal, *ipso facto* deprived the trial court of the right to proceed further. *Pennsylvania Co. v. Leeman, 16.*
2. *Waiver.*—Alleged error of court in denying the application of defendant for the removal of the cause to the federal court is not waived by the defendant by defending itself in the court below after its petition has been denied. *Pennsylvania Co. v. Leeman, 16.*
3. *Time of Making Application.*—A cause will not be reversed because of the ruling of the court in denying a petition for the removal of the cause to the federal court, where it appears from the record that the petitioner took a change of venue and afterward filed a dilatory plea on which a trial was had and made the application for removal more than five months after coming into court; since it will be presumed in view of the provisions of the code relative to the making of issues, nothing appearing in the

REMOVAL OF CAUSES—Continued.

record to the contrary, that the time when defendant was required to answer the complaint had expired when it tendered its application for removal. *Pennsylvania Co. v. Leeman, 16.*

4. *Amended Complaint.*—The action of the court in denying the application of defendant for the removal of a cause to the federal court because of delay in making the application will not be reversed because of the filing of an amended complaint, where the original complaint is not in the record and it can not be ascertained whether the cause was changed from a non-removable to a removable one. *Pennsylvania Co. v. Leeman, 16.*

REPUTATION—See CHARACTER.

RES GESTAE—Declarations of third party, see EVIDENCE, 9, 10; *Indianapolis St. R. Co. v. Whitaker, 125.*

RESIDENCE—Of plaintiff in divorce suit, see DIVORCE, 4; *Becker v. Becker, 407.*

REVIEW—See APPEAL AND ERROR.

ROADS—See GRAVEL ROADS; HIGHWAYS.

RULES—Failure to comply with Supreme Court rules, see APPEAL AND ERROR, 28-32.

SALES—

1. *Delivery.—Acceptance.*—In an action for goods sold and delivered, the seller is entitled to recover the contract price if he has delivered the property to the purchaser, or done such acts as vested the title in the purchaser if he had accepted it.

Rastetter v. Reynolds, 133.

2. *Warranty.—Breach.—Pleading.*—An answer to a complaint in an action on a promissory note given for the purchase money of a windmill alleged that plaintiffs expressly represented the windmill to be of such a quality, character, and capacity that under the force of a moderate wind it would grind from twenty to thirty bushels of grain per hour, and under a very light wind would pump an abundance of water; that defendant was ignorant in respect to its qualities and merits and believed the representations to be true, and was induced thereby to purchase the same; that it was not of the quality, character, or capacity as represented, and neither performed, nor was it capable of performing, the work which plaintiffs represented it would do; that it was worthless for any of the purposes for which it was sold, and wholly worthless to defendant for any purpose; that defendant repeatedly notified plaintiffs of its worthless condition and failure to operate and requested them to remove it from his premises, and still offers to permit them to remove it from his premises. *Held*, that the answer pleaded a warranty of the property sold, and a breach thereof, and states facts sufficient to bar the action on the note.

Smith v. Borden, 223.

SHELLEY'S CASE—Devise to daughter for life with power to sell and convey in fee simple, see WILLS, 8; *Teal v. Richardson, 119.*

SPECIAL FINDING—Failure to find material fact, see APPEAL AND ERROR, 88; *State Bank v. Backus, 682.*

Motion for supplemental finding, see APPEAL AND ERROR, 23; *Muncie Nat. Gas Co. v. City of Muncie, 97.*

STATUTES—Construction of statute to prevent waste of gas, see **GAS AND OIL WELLS**, 1, 2, 8; *Given v. State*, 552.

Penalty not referred to in title of act, see **CONSTITUTIONAL LAW**, 2; *Republic Iron & Steel Co. v. State*, 379.

Repeal by implication, see **HIGHWAYS**; *Sefton v. Board, etc.*, 357.

For table of statutes cited and construed, see page xxviii.

1. *Amendment.—Reference to Title.—Constitutional Law.*—Where the act or section to be amended is identified in the manner required by the Constitution, and it is not certain what act or section was amended, the court will resort to means other than the title to determine what act or section was amended; but if the act or section is not identified in the manner required by the Constitution, the court will not resort to such other means of identification, although the act intended would thereby be ascertained beyond question. *Mankin v. Pennsylvania Co.*, 447.

2. *Amendment.—Reference to Title.—Constitutional Law.*—The act of 1891 (Acts 1891, p. 376) amending §859 of the act of 1881 (Acts 1881, p. 240) concerning struck juries, the same being §525 R. S. 1881, refers to the title of the act to be amended as "An act concerning trial by jury," giving the number of the section of the act sought to be amended, and the section number thereof in the revised statutes of 1881. The title of the act of which the section sought to be amended is a part is "An act concerning proceedings in civil cases." *Held*, that the act of 1891 is unconstitutional and void, under §21 of article 4 of the Constitution, which provides: "No act shall ever be revised or amended by mere reference to the title, but the act revised or section amended shall be set forth and published at full length."

Mankin v. Pennsylvania Co., 447.

3. *Construction as to Cases Arising Subsequent to Amendment.*—Where a statute has been amended it must be treated, in cases arising subsequent to the amendment as if it had been enacted at the date of the amendment. *Given v. State*, 552.

STREET RAILROADS—

Injury to Passenger While Attempting to Alight.—Instruction.—Where the only negligence charged in an action against a street railway company was the sudden starting of the car while the plaintiff was on the running-board in the act of getting off, an instruction that plaintiff after she left the car assumed all risk in stepping or walking over the street in the condition it was then in was properly refused. *Indianapolis St. R. Co. v. Whitaker*, 125.

STREETS—See **MUNICIPAL CORPORATIONS**.

SUBROGATION—To rights of holder of tax lien, see **EXECUTION**, 2; *Blumenthal v. Tibbits*, 70.

SUMMONS—See **PROCESS**.

SUPERIOR COURTS—Jurisdiction on change of venue, see **APPEAL AND ERROR**, 5; *Mankin v. Pennsylvania Co.*, 447.

SUPREME COURT—Jurisdiction of, see **APPEAL AND ERROR**, 1-4; *Smith v. American, etc., Co.*, 441; *Consumers Paper Co. v. Eyer*, 424; *Taylor v. Patton*, 4.

TAX LIEN—Foreclosure, see **EXECUTIONS**, 2; *Blumenthal v. Tibbits*, 70.

TOWNS—See MUNICIPAL CORPORATIONS.

TOWNSHIPS—As party to proceeding for a drain, see DRAINS, 1;
Pleasant Tp. v. Cook, 533.

TRIAL—Leading questions, see WITNESSES, 1; *Indiana R. Co. v. Maurer*, 25.

Misconduct of counsel, see CRIMINAL LAW, 17, 18, 19; *Coppenhaver v. State*, 540.

Motion for supplemental finding, see APPEAL AND ERROR, 23;
Muncie Nat. Gas Co. v. City of Muncie, 97.

1. *Presence of Bailiff in Jury Room.*—*Criminal Law.*—*Appeal and Error.*—The action of the court in overruling a motion for a new trial on the ground that the bailiff was present in the jury room and conversed with the jurors while they were deliberating on a verdict will not be reversed on appeal, where such question was presented to the lower court, tried and determined upon evidence pro and con adversely to appellant. *Shular v. State*, 300.
2. *Evidence.*—*Offer to Prove.*—The ruling of the court in sustaining an objection to a question to a witness is not reviewable on appeal, where no statement was made as to what the witness would testify to in answer to the question. *Williams v. Chapman*, 130.
3. *Misconduct of Counsel.*—*Exception.*—*Appeal and Error.*—Where no objection was made to alleged misconduct of counsel in argument to the jury, it is too late to raise the question for the first time on appeal. *Consumers Paper Co. v. Eyer*, 424.
4. *Misconduct of Counsel.*—*Exception.*—*Appeal and Error.*—To present for review alleged misconduct of counsel in commenting upon instructions to be given the jury, a motion must be made to set aside the submission and withdraw the case from the jury, and an exception saved to the ruling of the court thereon. *Consolidated Stone Co. v. Morgan*, 241.
5. *Misconduct of Counsel in Argument to Jury.*—Statements made by counsel for plaintiff, in argument to the jury, in an action against a stone company for personal injuries, showing the large number of men killed in quarries, and that public policy demanded that the juries assess such damages against all the parties, and against this defendant in particular, as would fully compensate for all damages sustained, in order to compel the owners of stone quarries in general, and this defendant in particular, to exercise more care in the management of the quarries, were improper, and prejudicial to the rights of defendant, and should have been withdrawn from the jury, upon motion of defendant, and the jury instructed to disregard the same. *Perry, etc., Stone Co. v. Wilson*, 435.
6. *Offer to Prove in Presence of Jury.*—*Misconduct of Counsel.*—No available error exists because of an offer to prove an incompetent matter, made in the presence of the jury, where the offer was refused and the jury admonished by the court not to consider it. *Consumers Paper Co. v. Eyer*, 424.
7. *Directing Verdict.*—No error was committed in directing a verdict for defendant in an action by a trustee in bankruptcy to recover a sum of money alleged to have been received by defendant as preferential in violation of §60, subd. b of the bankruptcy law of 1898, 30 Stat. 562, where all the evidence concerning the payment was given by the bankrupt, and was in substance that witness who was master of exchequer of defendant lodge when

TRIAL—Continued.

he discovered his insolvent condition informed his wife of his having used the lodge's money and that she mortgaged her separate property and gave the husband the proceeds of the loan which he deposited in bank in his name as master of exchequer of the lodge and afterward delivered his check on the bank account to the trustees of the lodge, which account also included a deposit consisting of dues received from members of the lodge.

Goode v. Elwood Lodge, etc., 251.

8. *Instructions.—Verbal Inaccuracies.*—A cause will not be reversed because of the mere verbal inaccuracy in a sentence of an instruction, where the error was fully corrected and the meaning of the instruction made clear by the sentence following.

Starr v. State, 661.

9. *Instructions.—Appeal and Error.*—Appellant will not be heard to complain of an instruction given by the court which is substantially the same as one asked by him.

Consolidated Stone Co. v. Morgan, 241.

10. *Incomplete Instruction.—Harmless Error.*—The giving of an incomplete instruction is not reversible error, where the omission was fully covered by other instructions given.

Aspy v. Botkins, 170.

11. *Instructions.—Appeal and Error.—Harmless Error.*—The action of the court in giving and refusing to give instructions relating to a fact which the jury found did not exist, was harmless.

Baltimore, etc., R. Co. v. Harbin, 441.

12. *Instruction Must be Relevant to Issue.*—The propriety of an instruction is to be determined not by whether it embodies a correct statement of the law upon a given state of facts, but whether it correctly states the law relevant to the issuable facts given in evidence on the trial.

Indiana R. Co. v. Maurer, 25.

13. *Instruction not Relevant to Issues.—Injury of Street Car Passenger While Alighting from Car.*—Where, in an action against a street car company for personal injuries sustained by plaintiff while attempting to alight from a car, the only act of negligence complained of was the premature starting of the car, an instruction, that the defendant should be found guilty of negligence if its employes in charge of the car failed to assist plaintiff to alight, was erroneous.

Indiana R. Co. v. Maurer, 25.

14. *Contradictory Evidence.—Instruction.*—Where a witness has made contradictory statements as to material matters in issue, it is proper to instruct the jury that they are the exclusive judges of the credibility of witnesses, and that, in determining the weight to be given to the testimony of such witness, they might take into consideration certain specified matters, and that it was for them to determine what weight they should give to the testimony.

Aspy v. Botkins, 170.

15. *Instruction.—Weight of Evidence.—Invading Jury's Province.*—An instruction "That when witnesses are otherwise equally creditable, and their testimony otherwise entitled to equal weight, a greater weight and credit should be given to those whose means of information were superior, and also to those who swear affirmatively to a fact, rather than to those who swear negatively, or to a want of knowledge, or to a want of recollection," is erroneous, as being an invasion of the province of the jury.

Winklebleck v. Winklebleck, 570.

16. *Contributory Negligence.—Assumption of Risk.*—An instruction that if plaintiff "has proved the injury complained of was caused by

TRIAL—Continued.

some one or more of the specifications of negligence set out in the complaint, he may recover if he himself was without fault" is not bad for failure to observe the distinction between contributory negligence and assumption of risk, where none of the acts of negligence charged involved any question concerning assumption of risk.

Clear Creek Stone Co. v. Dearmin, 162.

17. *Instructions.—Burden of Proof.*—In an action to enforce a claim against a decedent's estate, it is not reversible error to instruct the jury that the plaintiff is entitled to recover if the material allegations of the complaint are proved by a fair preponderance of the evidence unless the jury were satisfied from the evidence that the defendant had established one or the other of the special answers pleaded, where, by other instructions, the court informed the jury that the burden was upon the plaintiff to prove all material allegations of the complaint.

Stanley's Estate v. Pence, 636.

18. *Improper Interrogatories.*—Interrogatories seeking to ascertain on which paragraph of the complaint the jury based its verdict are not authorized. *Clear Creek Stone Co. v. Dearmin, 162; Consolidated Stone Co. v. Morgan, 241.*

19. *General Verdict.—Interrogatories to Jury.—Presumptions.*—All reasonable presumptions will be indulged in support of the general verdict, and against answers to interrogatories.

Wright v. Chicago, etc., R. Co., 583.

20. *Verdict.—Answers to Interrogatories.—Conflict.*—The general verdict determines all issues in favor of the party recovering the same, and the verdict will stand as against a motion for judgment on answers to interrogatories unless the answers are in irreconcilable conflict therewith. *Wright v. Chicago, etc., R. Co., 583.*

21. The findings of the jury in answer to interrogatories override the general verdict only when both can not stand, the conflict being such as to be beyond the possibility of being reconciled by any state of facts provable under the issues.

Wright v. Chicago, etc., R. Co., 583.

22. In an action for injuries to an employe caused by a rope giving away and falling upon him while lowering the boom-pole of a derrick, the jury found in answer to interrogatories that if the rope had been sufficiently fastened the boom could have been safely lowered to a horizontal position; that if the boom had been stopped when it reached a horizontal position, the rope would not have pulled loose; that the injury was caused by the failure to stop the settling of the boom before the rope ran off the drum on which it was wound; and that there was no "satisfactory evidence" that the boom was lowered below a horizontal position. *Held*, that the answers are not in conflict with a general verdict for plaintiff. *Clear Creek Stone Co. v. Dearmin, 162.*

23. A general verdict will not be defeated by isolated facts disclosed by answers to interrogatories, unless such facts are shown to be so repugnant and contradictory to the general verdict that both can not be true under any conceivable state of facts provable under the issues.

Indiana R. Co. v. Maurer, 25.

24. A motion for judgment on the answers to the interrogatories notwithstanding the general verdict should be refused, unless the antagonism between the verdict and the answers is such, on the face of the record, as to be beyond the possibility of being removed by any evidence legitimately admissible under the issues.

Stoy v. Louisville, etc., R. Co., 144.

TRIAL—Continued.

25. In an action against a street car company for injuries sustained by plaintiff while attempting to alight from a car, the evidence showed that plaintiff held to the running-board of the car and was dragged thereby and injured. There was a general verdict for plaintiff, and in answer to an interrogatory as to whether plaintiff could have released his hold on the car and have avoided being injured, the jury answered "No evidence." *Held*, that the trial court, on motion by defendant for judgment notwithstanding the general verdict, could not presume that plaintiff could have released his hold by the exercise of ordinary care and was therefore guilty of contributory negligence.

Indiana R. Co. v. Maurer, 25.

26. *Injury to Brakeman.—Dangerous Nearness of Switch Target to Track.—Verdict.—Interrogatories.—Conflict.*—In an action against a railroad company by a brakeman for injuries sustained by him by being struck by a switch target while he was attempting to get on the cab of an engine, the complaint alleged that the cause of the injury was the negligence of the defendant in placing the switch target dangerously near the track. *Held*, that, as against a general verdict for plaintiff, it will not be presumed that the defendant was not guilty as charged, where the answers to interrogatories to the jury did not expressly so find.

Wright v. Chicago, etc. R. Co., 583.

27. *Interrogatories.—Failure to Answer.—Conflicting Evidence.—Verdict.*—Where in answer to an interrogatory the jury wrote "the evidence is conflicting," the court erred in overruling a motion to require the jury to answer the interrogatory, as it was the duty of the jury to answer the interrogatory according to the preponderance of the evidence the same as it was to render a general verdict, and if there was no preponderance either way, the jury should have answered the same against the party having the burden of proof as to the fact inquired about, and, if unable to agree upon the answer, they should have reported the same to the court and the court should have discharged them on account of such disagreement, the same as where the jury can not agree upon a general verdict.

Perry, etc., Stone Co. v. Wilson, 455.

28. *Instructions.—Answers to Interrogatories.*—Where the special finding of facts in an action for personal injuries shows that the defendant had knowledge of the defects and omissions complained of, and that the plaintiff was ignorant of them, an erroneous instruction on the subject of the knowledge of the parties was harmless.

Clear Creek Stone Co. v. Dearmin, 162.

29. *Defective General or Special Verdict.—Remedy.*—Where a special verdict or special finding is defective, because there is not a finding of all the matters in issue, or a finding of facts to exist which were not proved, the remedy is by motion for a new trial; but this rule is not applicable to general verdicts.

Maxwell v. Wright, 515.

30. *Defective Verdict.—Venire de Novo.*—Where, on an issue as to the execution of a note by two defendants, there was a general verdict for one of the defendants, such verdict was defective as not being responsive to the whole case, and a *venire de novo* should be awarded as to both defendants.

Maxwell v. Wright, 515.

31. *Remittitur.—Judgment.*—Where in a trial by the court a general finding for a certain amount was made, it was not error to grant a remittitur of a part of the finding and render a judgment for the remainder pending a motion for a new trial.

Whitcomb v. Stringer, 82.

TRUSTS—

1. *Parol.*—A trust in personal property or money may be created by parol. *Stanley's Estate v. Pence, 636.*
2. *Money Derived from Sale of Trust Land.*—Where there is no enforceable trust in land, an enforceable trust will not arise in the money derived from the sale of the land. *Alexander v. Spaulding, 176.*
3. *Suit to Enforce.—Implied Trust.*—Where the trust relied upon in a complaint is not alleged to be in writing, it will be presumed that it was in parol, and arises by implication from the facts averred. *Alexander v. Spaulding, 176.*
4. *Implied Trust.—Constructive Trust.—Complaint.*—The surviving husband of one of decedent's children instituted proceedings against the other children to recover his share of certain real estate. The complaint averred that prior to his death decedent had purchased certain lands and had them deeded, without consideration, to defendants to be held in trust for him; that afterwards he traded the lands, for other described lands, and, without consideration, had the deed of conveyance made to defendants, leaving the same a secret trust for himself and his heirs. The complaint did not contain allegations that decedent had furnished the purchase money, and that the deed had been placed in grantees' names without their father's consent; nor was it alleged that defendants purchased the land in violation of a trust, nor that defendants had received the conveyance by agreement, without fraudulent intent. *Held*, that the complaint did not state facts showing an implied trust, within the meaning of §§3396, 3398 Burns 1901. *Held*, also, that the complaint does not state facts amounting to a constructive trust. *Alexander v. Spaulding, 176.*
5. *Continuing Trust.—Limitation of Action.*—Where a husband received money from his wife with the understanding that the same was to be paid to the children at the time of his death, or sooner if he chose to do so, a continuing trust was created, against which the statute of limitations does not run. *Stanley's Estate v. Pence, 636.*
6. *Liability of Trustees for Interest on Trust Funds.*—Where a husband received money from his wife with the understanding that the same was to be held in trust for her children, and the husband used the money as his own, the children could, at his death, recover from his estate the money with interest at the rate of six per cent. per annum. *Stanley's Estate v. Pence, 636.*

ULTRA VIRES—See MUNICIPAL CORPORATIONS, 15; *Muncie Nat. Gas Co. v. City of Muncie, 97.*

UNDUE INFLUENCE—To secure execution of deed, see DEEDS, 1; *Thorne v. Cosand, 566.*

VARIANCE—Failure to prove all the allegations of the complaint, see PLEADING, 3, 4; *Stanley's Estate v. Pence, 636.*

VENDOR AND PURCHASER—

Deed.—Delivery.—Interest of Widow of Purchaser.—A purchaser of land held possession thereof under an executory contract for a conveyance upon the payment of the purchase price. Default was made in payment, and vendor brought suit on the purchase-money notes and filed with his complaint a deed to the property for the use of vendee upon his payment of the notes.

VENDOR AND PURCHASER—Continued.

The vendee, without consent of vendor, and without payment of the notes, took the deed from the files and caused it to be recorded. Vendor obtained a judgment foreclosing the lien of the notes against the land, without making the vendee's wife a party, and purchased the land at sheriff's sale. The vendee died without redeeming the land and his wife brought suit for partition. *Held*, that the wife had no interest in the land. *Schaefer v. Purviance*, 63.

VENIRE DE NOVO—See NEW TRIAL.

VENUE—Change of venue in receivership case, see **RECEIVERS**, 4; *Whitcomb v. Stringer*, 82.

Record of pleadings transmitted on change of venue, see **APPEAL AND ERROR**, 9; *Southern Ind. R. Co. v. Martin*, 280.

The right to a change questioned on appeal, see **APPEAL AND ERROR**, 5; *Mankin v. Pennsylvania Co.*, 447.

VERDICT—See INTERROGATORIES TO JURY; TRIAL.

Court directing verdict, see **TRIAL**, 7; *Goode v. Elwood Lodge, etc.*, 251.

Failure to find age of defendant, see **CRIMINAL LAW**, 23; *Boone v. State*, 678.

WAGES—See WORK AND LABOR.

WAIVER—Of defect of parties, see **PARTIES**; *Boscker v. Chamberlain*, 114.

Of error, see **APPEAL AND ERROR**, 45, 46; *Board, etc., v. Mowbray*, 10; *Clear Creek Stone Co. v. Dearmin*, 162; *Smith v. Borden*, 223; *Board, etc., v. Mowbray*, 10.

WARRANTY—Answer pleading breach, see **SALES**, 2; *Smith v. Borden*, 223.

WATER-WORKS—Property devoted to public use, see **MUNICIPAL CORPORATIONS**, 17; *Lake County Water & Light Co. v. Walsh*, 32.

WILLS—Will as evidence, see **EVIDENCE**, 14; *Alexander v. Spaulding*, 176.

1. *By Married Women.—Revocation.*—An agreement by a married woman with her husband that if he will not make a will and he should die before she died, she will make a will making certain gifts, does not operate to revoke her existing will, but at most creates a charge upon the property inherited by the wife from her husband in favor of the persons for whom she failed to make provision according to the agreement.

Hibberd v. Trask, 498.

2. *By Married Women.—Divorce.—Remarriage.*—Where a married woman executes a will and thereafter is divorced, her remarriage to her former husband does not, under §2732 Burns 1901, operate as a revocation of the will.

Hibberd v. Trask, 498.

3. *Construction.—Rule in Shelley's Case.*—A devise of real estate to testator's daughter "to have and to hold during her natural life, with power to my said daughter to sell and convey the same in fee simple in case it becomes necessary so to do, and the remainder after her death to the heirs of her body in fee simple,"

WILLS—Continued.

falls within the rule in *Shelley's Case*, and, under §3878 Burns 1901, abolishing estates tail, vests in the daughter a fee simple estate. *Teal v. Richardson*, 119.

4. *Construction*.—Where real estate is devised in fee simple to one, coupled with a devise over if such devisee should die without issue living at the time of his death, the words refer to a death without issue during the lifetime of the testator, and the primary devisee surviving the testator takes an absolute estate. *Teal v. Richardson*, 119.

WITNESSES—Physician as witness, see EVIDENCE, 6, 7; *Seifert v. State*, 464.

To prove residence of plaintiff in divorce suit must be freeholders and householders, see DIVORCE, 4; *Becker v. Becker*, 407.

Admissions as to facts set forth in affidavits for continuance to avoid continuance, see CONTINUANCE; *Indiana R. Co. v. Maurer*, 25.

1. *Leading Questions*.—*Discretion of Court*.—While as a general rule leading and suggestive questions should be disallowed, yet, to permit leading questions will not constitute reversible error unless it very clearly appears that there was such abuse of discretion as amounts to substantial injustice.

Indiana R. Co. v. Maurer, 25.

2. *Physicians*.—*Privileged Communication*.—*Malpractice*.—In an action against a surgeon for malpractice, a physician who had treated plaintiff after defendant's employment had terminated is incompetent to testify over plaintiff's objection. *Aspy v. Botkins*, 170.

3. *Malpractice*.—*Plaintiff as Witness*.—*Privileged Communications*.—In an action against a surgeon for negligence in treating plaintiff's knee, the plaintiff can not be required to testify as to the manner of treatment by a physician employed after defendant's employment had terminated. *Aspy v. Botkins*, 170.

WORDS AND PHRASES—Verbal inaccuracies in instructions, see TRIAL, 8; *Starr v. State*, 661.

Use of "consistent" instead of "inconsistent" in instruction, see CRIMINAL LAW, 22; *Hampton v. State*, 575.

WORK AND LABOR—Monthly payment wage law, see MASTER AND SERVANT, 1; *Toledo, etc., R. Co. v. Long*, 564.

Minimum wage law is unconstitutional, see CONSTITUTIONAL LAW, 8; *Street v. Varney Electrical Sup. Co.*, 338.

Weekly wage law is unconstitutional, see CONSTITUTIONAL LAW, 1; *Republic Iron & Steel Co. v. State*, 379.

Assignment of wages, see CONSTITUTIONAL LAW, 4; *International Text-Book Co. v. Weissinger*, 349.

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